TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907

No. [redacted]62.

ATLANTIC COAST LINE RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

A. VON LEHE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

FILED JANUARY 25, 1908.

(20,988.)

(20,988.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 260.

ATLANTIC COAST LINE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

A. VON LEHE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 5, 1909.

1 STATE OF SOUTH CAROLINA:

In the Supreme Court, April Term, 1907.

Appeal from Colleton County, Ninth Circuit.

A. VON LEHE, Plaintiff, Respondent,
vs.
ATLANTIC COAST LINE RAILROAD COMPANY, Defendant, Appellant.

J. S. Griffin, Attorney for Plaintiff, Respondent.
W. Huger Fitzsimons, Attorney for Defendant, Appellant.

"Case."

Action for $55.65, commenced September 4, 1906, in Magistrate's Court before Magistrate J. E. Bryan, Walterboro, S. C.

The following is the Summons and Statement thereto attached:

STATE OF SOUTH CAROLINA,
County of Colleton:

Magistrate's Summons.

2 By J. E. Bryan, Esq., Magistrate in and for said County of the said State.

To any lawful constable:

Complaint having been made unto me by A. von Lehe that The Atlantic Coast Line Railroad Co., is indebted to him in the sum of Fifty-Five dollars and Sixty-Five cents as is shown by the itemized statement attached. That the defendant is a corporation existing under the laws of this State.

These are, therefore, to require you to summon the said defendant to appear before me in my office in Walterboro, S. C., on the 24th day of September, A. D. 1906, at 11 o'clock A. M. to answer to the said Complaint or judgment will be given against The Atlantic Coast Line Railroad Co., by default.

Given — my hand and seal at Walterboro, S. C., the 4th day of September, A. D. 1906.

J. E. BRYAN, *Magistrate.* [L. S.]

Endorsed on the Summons was statement that Trial day was September 24th, 1906.

Statement.

WALTERBORO, S. C.

Atlantic Coast Line Railroad Co. to A. von Lehe, Dr.

June 1, 1906. To 2 sks. shorts @ 1.35½	$2.71
June 1, 1906. To 2 sks. grits @ 1.47	2.94
Penalty	50.00
	$55.65

Shipped by Liberty Mills, Nashville, Tenn., May 23rd 1906. Claim filed with Co. June 1st, 1906.

Served by Deputy at my office September 4th, 1 P. M., A. S. Morrall, Agent.

To the above Summons the following answer was duly served:

"STATE OF SOUTH CAROLINA.
County of Colleton:

In the Magistrate's Court.

3 A. VON LEHE, Plaintiff,
vs.
ATLANTIC COAST LINE RAILROAD COMPANY, Defendant.

Answer.

The defendant A. C. L. R. R. Co., by its attorney, answering the summons of plaintiff, here, for answer thereto, saith:

1. That the defendant denies each and every allegation, and said summons containing.

2. Further answering the plaintiff's summons, the defendant alleges that the alleged loss of freight was for goods shipped from Nashville, Tennessee, to Walterboro, South Carolina, and that the loss did not occur on the lines of the defendant.

3. Further answering the plaintiff's summons, the defendant alleges that the said shipment was from without this State, and that the Statute providing for the penalty sued for, as applied to interstate shipments is an interference with the Federal Constitution in relation to interstate commerce, and is therefore invalid as to such shipments.

4. That the statute providing for the penalty, sued for by plaintiff is unconstitutional, null and void, in that it undertakes to interfere with the right of contract, in prescribing a penalty for "failure to adjust and pay" within the period named, the said statute undertaking to require payment of all claims whether meritorious or not.

5. That the said act upon which plaintiff's action is based is further invalid and void, it being in direct conflict — Art. I, Section 8 of the Federal Constitution in relation to interstate commerce, it

appearing upon the face of the complaint that the shipment was made from without the State.

JAMES E. PEURIFOY,
Defendant's Attorney.

Walterboro, S. C., September 24, 1906.

Upon the trial before the Magistrate the following testimony was taken:

"A. VON LEHE, sworn, says:

On May 23rd, 1906, I had shipped from Liberty Mills, Nashville, Tenn., 2 sacks Grist and 2 sacks Shorts (or Brand) and on May 30th, 1906, I sent to depot for same, and found that 2 sacks grist
4 and 2 sacks shorts (or Bran) was short. I paid freight on the 20 sacks grist and 2 sacks shorts (or Bran) and hauled the 18 sacks grist to my store, and on June 1st I made bill against Atlantic Coast Line Railroad Company at Walterboro, S. C., Colleton County, and presented it to agent for 2 sacks, $2.71 shorts and 2 sacks $2.94 grist amounting to $5.65. I then waited for the 90 days and three or four days longer for claim to be paid, and the same was not paid, then I turned claim or bill over to Trial Justice for collection in with penalty of $50.00.

Cross-examination:

The amount charged is the invoice price. I made this claim after the arrival of the 18 sacks of grist. After I brought this suit the agent of defendant offered to pay me the $5.65. I saw no money. When Mr. Morrall came to my store after this suit was brought he offered to pay this claim less the $50.00 penalty, and I told him the matter was in the Magistrate's hands, and he would have to settle with him.

A. VON LEHE.

A. VON LEHE recalled says, that from the time he filed this claim to the time he brought this suit that the defendant did not write or notify him anything concerning this claim.

Cross-examination:

I did not write defendant anything after the filing of this claim and did not call their attention to this claim in any way.

A. VON LEHE.

A. VON LEHE, Plaintiff,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY, Defendant.

On call of this case the defendant answered and filed answer marked Exhibit "A." The freight bill introduced in evidence and marked Exhibit "B," and invoice introduced in evidence and marked Exhibit "C."

Defendant's Testimony.

A. S. MORRALL, sworn, says: I am the agent of the Atlantic Coast Line Railroad Company. The shortage occurred as Mr. von Lehe stated. These goods were shipped from Nashville, Tenn. Mr. von Lehe filed a claim with me for the shortage for $5.65. I called on Mr. von Lehe and told him that I was prepared to pay him this claim for grits and shorts or chops, but declined to pay the $50.00 penalty. He would not accept the $5.65. This was after this suit was brought, after this claim was brought. I did all I could to locate this shortage, and could not find the goods on our line. I would say the goods in question were shipped from Nashville, Tenn. over the Nashville & Chattanooga Ry., to Atlanta Ga., and then over the Georgia Ry., to Augusta, and then over the C. & W. C. to Yemassee, and from Yemassee over the A. C. L. R. R. Co., to Walterboro.

Cross-examination:

The Magistrate served me with a copy of the paper in this case.

A. S. MORRALL.

The following is the Magistrate's Report:

A. VON LEHE, Plaintiff.

vs.

ATLANTIC COAST LINE RAILROAD COMPANY, Defendant.

To His Honor, Circuit Judge:

I, J. E. Bryan, Magistrate, who tried and determined the above stated case, beg leave to report. This case was brought to recover part of a shipment of freight that was never delivered to plaintiff by defendant. Under Section 50 page 81 of the Acts of the General Assembly of 1903, and after hearing all the evidence in the case and argument of counsel and in view of the fact that the defendant had collected the freight charges on the part of the shipment of goods that they failed to deliver and had not notified the plaintiff as to how and why they did not pay his claim or where his goods were lost for more than 90 days. After he filed his claim I thought he should have judgment for the cost price of his goods and the fifty dollars penalty as fixed by statute and I so found in answer to first Grounds of Appeal. The testimony does not show where the loss occurred. The testimony of defendant's witness, Mr. A. S. Morrall, was that he could not locate the lost goods on his line.

In answer to second Grounds of Appeal, the testimony does not show that due diligence was used. Witness said he did all he
6 could to locate the shortage and could not find the goods on our lines.

In answer to third and fourth Grounds of Appeal, I do not know whether the Act is in conflict with the Federal Constitution or that the statute is unconstitutional or not. All of which is respectfully submitted.

J. E. BRYAN, *Magistrate.*

Judgment.

I find for the plaintiff the amount claimed five Dollars and sixty-five cents, and the penalty of fifty Dollars together with all costs of this case and it's the order of this Court that the plaintiff have judgment against the defendants for fifty-five and 65 100 Dollars and costs.

J. E. BRYAN, *Magistrate.*

September.

From the judgment of the Magistrate in favor of plaintiff the following Notice and Grounds of Appeal were taken:

STATE OF SOUTH CAROLINA,
County of Colleton:

In Circuit Court.

A. VON LEHE, Plaintiff,
vs.
ATLANTIC COAST LINE RAILROAD COMPANY, Defendants.

Notice and Grounds of Appeal.

To J. E. Bryan, Esq., magistrate, and A. von Lehe, plaintiff:

Please take notice that the defendant appeals from the finding and judgment rendered herein by said Magistrate to the Circuit Court for Colleton County upon the following grounds.

1. That the Magistrate erred in finding for the plaintiff, the testimony having shown that the loss did not occur on the line of the defendant.

2. That the Magistrate erred in finding for the plaintiff the testimony having shown that the defendant, by the exercise of due diligence, had been unable to trace the line upon which such loss, damage, or destruction occurred.

3. That the testimony having shown the shipment sued upon to have been made from without this State, the Magistrate erred in finding for the plaintiff, and in not holding and deciding that the statute providing for the penalty sued for as applied to inter-
7 state shipments is in conflict with the Federal Constitution relating to interstate commerce; that such act is an interference with interstate commerce, and is therefore, invalid as to such shipments.

4. That the said Magistrate erred in not holding and deciding that the said statute is unconstitutional, null and void, the same being in conflict with Section 5, Article I, constitution of 1895, *and the constitution of the United States, Article 5*, providing that no person shall be deprived of life, liberty or property without due process of law, the said statute undertaking to require the defendant to "adjust and pay" all claims without regard to their merit, and

providing a penalty for failure to "adjust and pay" within the time prescribed.

Walterboro, S. C., Oct. 5, 1906.

J. E. PEURIFOY,
Defendant's Attorney.

The case came on to be heard before his Honor Judge R. O. Purdy who after hearing argument reserved his decision and subsequently filed the following Order dated February 2, 1907.

THE STATE OF SOUTH CAROLINA.
Colleton County:

Court of Common Pleas.

Case No. I. Calendar 2. No. 67.

A. VON LEHE, Plaintiff,
vs.
ATLANTIC COAST LINE RAILROAD COMPANY, Defendant.

Case No. II. Calendar 2. No. 71.

A. VON LEHE, Plaintiff.
vs.
ATLANTIC COAST LINE RAILROAD COMPANY, Defendant.

These two cases were heard together.

The appellant contended that Murphy *vs.* Railroad Controlled this case, and I was inclined to the opinion that he was right. Since that time, the case of Skipper *vs.* Seaboard Air Line Company, 75 S. C., page 276, has been decided. Following the judgment in that case, the exceptions in these two cases must be overruled, and the judgment in each case must be and is hereby affirmed.

February 2, 1907.

R. O. PURDY,
Presiding Judge.

From this Order the following Notice of appeal to the Supreme Court was duly served.

8 STATE OF SOUTH CAROLINA.
County of Colleton:

Court of Common Pleas.

Case No. H. Calendar 2, No. 71.

A. VON LEHE, Plaintiff,
vs.
ATLANTIC COAST LINE RAILROAD COMPANY, Defendant.

Notice of Appeal.

To J. S. Griffin, Esq., Plaintiff's Attorney:

Please take notice that the defendant appeals, and intends to appeal, to the Supreme Court from the judgment and order rendered herein by the Circuit Court.

W. H. FITZSIMONS,
J. E. PURIFOY,
Defendant's Attorneys.

Walterboro, S. C., February 22, 1907.

Thereafter the following Exceptions were duly served:

Exceptions.

Defendant excepts to the Order of his Honor Judge Purdy dated February 2, 1907, and to the judgment entered thereon in this case for the purpose of appeal to the Supreme Court of South Carolina upon the following grounds.

1. Because the Penalty Act of the Legislature of South Carolina passed on the 23rd day of February 1903, 24th Stats. S. C. p. 81 is unconstitutional, null, and void in so far as it attempts to impose a penalty upon shipments from without this State in that it violates the Commerce Clause of the Constitution of the United States, Ar. 1. Sec. 8, and imposes a burden upon and is a regulation of Interstate commerce.

2. Because his Honor the Presiding Judge erred in holding that the decision in the case of Central R. R. of Georgia against Murphy 196 U. S., 194, does not control this case.

3. Because it is respectfully submitted it is error to hold that the case of Skipper *vs.* Seaboard Air Line Railway 75 S. C. 276 is in effect a decision upon the constitutionality of the Penalty Act 24 Stats. S. C., 81, and is authority for the judgment entered up in this case.

W. HUGER FITZSIMONS,
Attorney for Defendant, Appellant.

[Seal Supreme Court of South Carolina.]

A true copy:
U. R. BROOKS, *Clerk.*

9 STATE OF SOUTH CAROLINA:

In the Supreme Court, April Term, 1907, Ninth Circuit, Colleton County.

A. VON LEHE, Plaintiff-Respondent,
against
ATLANTIC COAST LINE RAILROAD COMPANY, Defendant-Appellant.

Opinion by C. A. Woods, A. J.

The plaintiff recovered judgment in a magistrate's Court for the value of two sacks of grist and two sacks of flour shipped from Nashville, Tenn., to plaintiff at Walterboro S. C., and the statutory penalty of fifty dollars. The judgment was affirmed by the Circuit Court and the defendant appeals solely on the ground that the penalty statute of 1903 (24 Stat. 81) is unconstitutional. The question has been settled by the case of Charles *vs.* R. R. Co., recently filed.

The judgment of this Court is that the judgment of the Circuit Court be affirmed.

[Seal Supreme Court of South Carolina.]

A true copy.
U. R. BROOKS, *Clerk*.

[Endorsed:] Remittitur. No. 90. Von Lehe *v.* A. C. L. R. R. Co.

10 Supreme Court of the United States, October Term, 1907.

ATLANTIC COAST LINE RAILROAD COMPANY, Plaintiff in Error,
against
A. VON LEHE, Defendant in Error.

Assignments of Error.

Now comes the Atlantic Coast Line Railroad Company, Plaintiff in Error, and respectfully represents that it feels aggrieved by the proceedings and judgment of the Supreme Court of the State of South Carolina in the above entitled cause, and in connection with its petition for writ of error herein makes the following assignments of error, to-wit:

I.

That the said Supreme Court of South Carolina in its final judgment rendered in said cause erred in holding that the Act of the General Assembly of the State of South Carolina approved the 23d day of February, 1903 (24 Stat. at L., p. 81), entitled "An Act to Regulate the Manner in Which Common Carriers Doing Business in this State Shall Adjust Freight Charges and Claims for Loss of or Damage to Freight," which imposes a penalty of Fifty Dollars for failure to

adjust and pay within ninety days after filing a claim for loss of or damage to freight coming from without the State, so far as it affects carriers doing business in the State of South Carolina who fail or refuse to adjust and pay the loss of or damage to goods either proved or *presumed* to have come into their possession, is not an unlawful interference with interstate commerce, even as applied to an
11 interstate shipment; whereas said court should have held that said Act was an illegal regulation of and burden upon interstate commerce in violation of Article I, sec. 8, clause 3, of the Constitution of the United States.

Wherefore the said Atlantic Coast Line Railroad Company, Plaintiff in Error, prays that said judgment of the Supreme Court of the State of South Carolina be reversed, and that the said Supreme Court of the United States may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

WILLCOX & WILLCOX,
W. H. FITZSIMONS,
HENRY E. DAVIS,
Attorneys for Plaintiff in Error.

12 [Endorsed:] Supreme Court of the United States, October —, 1907. Atlantic Coast Line R. R. Co., Plaintiff in Error, *vs.* A. von Lehe, Defendant in Error. Assignments of Error. Original. 6654.

13 Know all men by these presents, That we, Atlantic Coast Line Railroad Company, as principal, and the American Surety Company of New York, as sureties, are held and firmly bound unto A. von Lehe in the full and just sum of Four Hundred ($400.00) Dollars to be paid to the said A. von Lehe, his certain attorneys, executors, administrators, heirs or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 7th day of October in the year of our Lord one thousand nine hundred and seven.

Whereas, lately at a term of the Supreme Court of the State of South Carolina in a suit depending in said Court between A. von Lehe and Atlantic Coast Line Railroad Company a judgment was rendered against the said Atlantic Coast Line Railroad Company, and the said Atlantic Coast Line Railroad Company having obtained a writ of error and filed a copy thereof in the Clerk's Office of said Court to reverse the judgment in the aforesaid suit, and a citation directed to A. von Lehe citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington within thirty days from the date thereof,

Now, the condition of the above obligation is such, That
14 if the said Atlantic Coast Line Railroad Company shall prosecute its writ of error to effect, and answer all damages

and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

[SEAL.] ATLANTIC COAST LINE RAILROAD COMPANY.
By J. R. KENLY, *Vice-President.*

Attest:
GEO. B. ELLIOTT,
Ass't Secretary.

[SEAL.] AMERICAN SURETY COMPANY OF NEW YORK.
CLAYTON GILES, JR.,
Resident Ass't Secretary.

Attest:
JOHN D. BELLAMY,
Resident Vice-President.

Approved:
Y. J. POPE,
Chief Justice of the Supreme Court of South Carolina.

[Seal Supreme Court of South Carolina.]

A true copy.
U. R. BROOKS, *Clerk.*

15 [Endorsed:] Atlantic Coast Line R. R. Co., Plaintiff in Error, *vs.* A. von Lehe, Defendant in Error. Copy. Bond. 6654.

16 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of South Carolina. Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court before you, or some of you, being the highest Court of law or equity of the said State in which a decision could be had in the said suit between A. von Lehe, plaintiff, and Atlantic Coast Line Railroad Company, defendant, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the

decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said defendant, Atlantic Coast Line Railroad Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you,
17 if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 4th day of October, in the year of our Lord one thousand, nine hundred and seven.

[Seal U. S. Circuit Court, District of So. Carolina.]

C. J. MURPHY,
Clerk of the Circuit Court of the United States
for the District of South Carolina.

Allowed to operate as a *supersedeas:*
Y. J. POPE,
Chief Justice of the Supreme Court
of South Carolina.

18 [Endorsed:] United States of America. Atlantic Coast Line Railroad Company, Plaintiff in Error, *vs.* A. von Lehe, Defendant in Error. Writ of Error. Original. 6654.

[Endorsed.]

STATE OF SOUTH CAROLINA,
County of Colleton:

Personally appeared W. P. Shipley, who made oath that he served the within Writ of Error on J. S. Griffin, Esq., by delivering to him personally, and leaving with him, a copy of the same, at his office in Walterboro, S. C., on the 12th day of October, 1907; that he knows the person so served to be J. S. Griffin, attorney for A. von Lehe, Defendant in Error, and that deponent is not a party to the action.

W. P. SHIPLEY.

Sworn to before me this 12th day of Oct., 1907.

JNO. H. PEURIFOY, [L. S.]
Notary Public, S. C.

19 STATE OF SOUTH CAROLINA:

In the Supreme Court.

A. VON LEHE, Respondent,
vs.
ATLANTIC COAST LINE RAILROAD COMPANY, Defendant in Error.

Return to Writ of Error.

I, U. R. Brooks, Clerk of the Supreme Court of the State of South Carolina, by way of return to the Writ of Error directed to said Court by the Supreme Court of the United States in the above entitled cause, herewith transmit under my hand and seal a true copy of the record and of the assignment of errors and of all proceedings in the case, together with true copies of all opinions filed in the case, and I hereby certify that the record herewith transmitted is complete, containing in itself and not by reference all the papers, exhibits, depositions and other proceedings necessary to the hearing of said case in the Supreme Court of the United States.

Witness my hand and the seal of the Supreme Court of the State of South Carolina this 11th day of November, 1907.

[Seal Supreme Court of South Carolina.]

U. R. BROOKS,
Clerk of the Supreme Court of South Carolina.

20 *Citation.*

UNITED STATES OF AMERICA, *ss:*

To A. von Lehe, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of the State of South Carolina, wherein Atlantic Coast Line Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Y. J. Pope, Chief Justice of the Supreme Court of the State of South Carolina, this 4th day of October in the year of our Lord one thousand nine hundred and seven.

Y. J. POPE,
Chief Justice of the Supreme Court of the State of South Carolina.

21 [Endorsed:] United States of America. Atlantic Coast Line R. R. Co., Plaintiff in Error, *vs.* A. von Lehe, Defendant in Error. Citation. Original. 6654.

[Endorsed.]

STATE OF SOUTH CAROLINA,
County of Colleton:

Personally appeared W. P. Shipley who made oath that he served the within Citation on J. S. Griffin, Esq., by delivery to him personally and leaving with him a copy of the same at his office in Walterboro, S. C., on the 12th day of October, 1907; that he knows the person so served to be J. S. Griffin, attorney for A. von Lehe, Defendant in Error; and that deponent is not a party to the action.

W. P. SHIPLEY.

Sworn to before me this 12th day of October, 1907.

JNO. H. PEURIFOY, [L. S.]
Notary Public, S. C.

Endorsed on cover: File No. 20,988. South Carolina Supreme Court. Term No. 260. Atlantic Coast Line Railroad Company, plaintiff in error, *vs.* A. von Lehe. Filed January 25th, 1908. File No. 20,988.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 59

ATLANTIC COAST LINE RAILROAD COMPANY,
PLAINTIFF IN ERROR,
vs.
MAZURSKY.

No. 59

SOUTHERN EXPRESS COMPANY,
ERROR,
vs.
McTEER.

No. 60

ATLANTIC COAST LINE RAILROAD COMPANY,
PLAINTIFF IN ERROR,
vs.
CHARLES.

No. 61

ATLANTIC COAST LINE RAILROAD COMPANY,
PLAINTIFF IN ERROR,
vs.
VON LEHE.

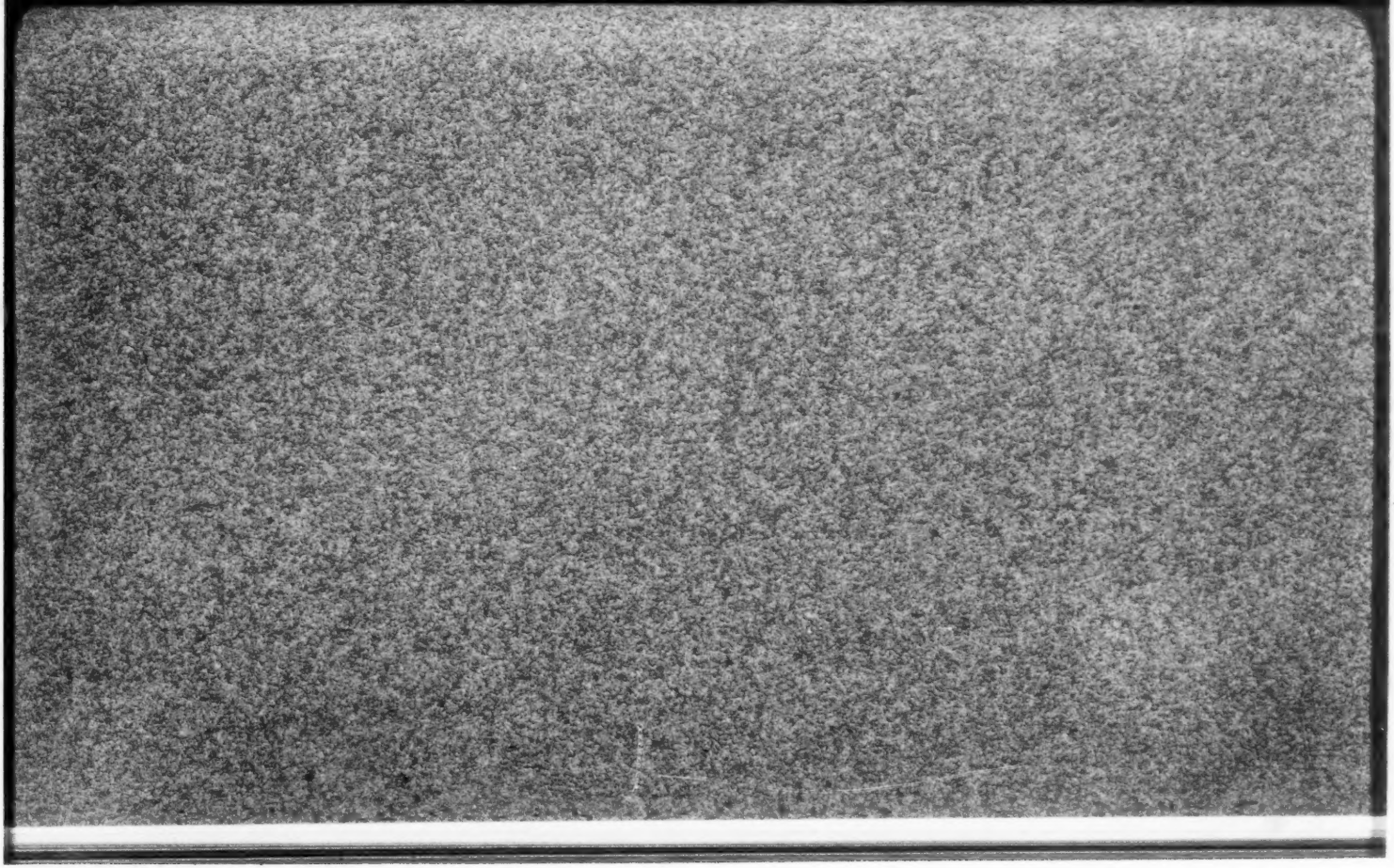
No. 62

ATLANTIC COAST LINE RAILROAD COMPANY,
PLAINTIFF IN ERROR,
vs.
VON LEHE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

BRIEF FOR PLAINTIFFS IN ERROR.

FREDERIC D. McKENNEY,
P. A. WILLCOX,
F. L. WILLCOX,
HENRY E. DAVIS,
Attorneys for Plaintiffs in Error.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 58

ATLANTIC COAST LINE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

MAZURSKY.

No. 59

SOUTHERN EXPRESS COMPANY, PLAINTIFF IN ERROR,

vs.

McTEER.

No. 60

ATLANTIC COAST LINE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

CHARLES.

No. 61

ATLANTIC COAST LINE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

VON LEHE.

No. 62

ATLANTIC COAST LINE RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

VON LEHE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

BRIEF FOR PLAINTIFFS IN ERROR.

Short Statement.

By act of the General Assembly of South Carolina, approved February 23, 1904, No. 50, 24 Statutes, S. C., page 81, entitled "An act to regulate the manner in which common carriers doing business in this State shall adjust freight charges and claims for loss of or damage to freight," it was enacted:

> "SEC. 2. That every claim for loss or damage to property while in the possession of such common carrier shall be adjusted and paid within forty days, in case of shipments wholly within this State, and within ninety days, in case of shipments without this State, after the filing of such claim with the agent of such carrier at the point of destination of such shipment: *Provided*, That no such claim shall be filed until after the arrival of the shipment or some part thereof at the point of destination, or until after such common carrier shall be liable for the amount of such loss or damage, together with interest thereon from the date of the filing of the claim therefor until the payment thereof. Failure to adjust and pay such claim within the periods herein prescribed shall subject each carrier so failing to a penalty of fifty dollars

for each and every such failure, to be recovered by any consignee or consignees aggrieved in any court of competent jurisdiction: *Provided*, That unless such consignee or consignees recover in such action the full amount claimed, no penalty shall be recovered, but only the actual amount of the loss or damage, with interest as aforesaid: *Provided, further*, That no common carrier shall be liable under this act for property which never came into its possession, if it complies with the provisions of section 1710, vol. 1 of the Code of Laws of South Carolina, 1902."

Section 1710, volume 1, of the Code of Laws of South Carolina, 1902, is as follows:

"When under contract for shipment or express over two or more common carriers, the responsibility of each or any of them shall cease upon delivery to the connecting line 'in good order,' and if such freight or express has been lost, damaged, or destroyed, it shall be the duty of the initial, delivering or terminal road, upon notice of such loss, damage or destruction being given to it by shippers, consignee, or their assigns, to adjust such loss or damage with the owners of said goods within forty days, and upon failure to discharge such duty within forty days, after such notice, or to trace such freight or express, and inform the said party so notifying when, where and by which carrier the said freight or express was lost, damaged or destroyed, within said forty days, then said carrier shall be liable for all such loss, damage or destruction in the same manner and to the same extent as if such loss, damage or destruction occurred on its lines, *Provided*, That, if such initial, terminal or delivering road can prove that, by the exercise of due diligence, it has been unable to trace the line upon which such loss, damage or destruction occurred it shall thereupon be excused from liability under this section."

To test the validity of the provisions of the act first indicated (24 Stats. S. C., 81) when applied to claims for loss or damage to interstate freight is the object of the pending

writ of error, addressed to the Supreme Court of South Carolina, in each of the above cases.

In each case the objection that said section of the State statute was unconstitutional and invalid, because repugnant to the provisions of Article I, section 8, paragraph 3, of the Constitution of the United States, was seasonably made.

In each case this objection was overruled and judgment given in favor of the respective claimants or plaintiffs for the value of the undelivered freight plus the full statutory penalty of fifty (50) dollars.

The opinion of the Supreme Court of South Carolina construing and applying above provisions of the State statute is printed in full, beginning on page 12 of the printed transcript of the record in case (No. 60) of Atlantic Coast Line Railroad Company *v.* R. Keith Charles. In each of the other of the above cases, by direct reference thereto, the principles assumed to have been settled in and by that opinion are made the basis of the judgment of the State Supreme Court.

DETAILED STATEMENT OF FACTS AND PROCEDURE IN EACH CASE.

No. 58

Atlantic Coast Line Railroad Company, Plaintiff in Error,
v.
B. Mazursky.

B. Mazursky sued the Atlantic Coast Line Railroad Company in a magistrate's court of Barnwell County, South Carolina, for $1.10, the value of one box of collars, part of a larger shipment, forwarded to said Mazursky at Barnwell, South Carolina, from Albany, New York, and alleged to have been lost in transit, and also to recover, in addition to the value of said collars, the statutory penalty of fifty dollars for failure to adjust and pay his claim for such loss within ninety days after the filing thereof (R., 1). The defendant company, alleging its interstate character as a common carrier, pleaded that so much of the act above referred to as provided a penalty of fifty dollars, payable under conditions set forth in the complaint, was "unconstitutional, null and void, in this, that it attempts to regulate, interfere with, and to impose a burden upon, interstate commerce, a subject which, under the Constitution and laws of the United States, is devolved solely upon the Congress of the United States. Section 8, Article 1" (R., 2).

Upon hearing the magistrate gave judgment in favor of the plaintiff for the sum of $51.10. From this judgment the railroad company duly noted an appeal to the Circuit Court of Barnwell County, where, after hearing, the judgment of the magistrate's court was affirmed (R., 4, 5). From this judgment the railroad company further appealed to the Supreme Court of the State (R., 5, 6), expressly assigning as grounds of appeal the contention indicated in its answer (R., 6).

Upon hearing the Supreme Court of the State of South Carolina finally affirmed the judgment of the magistrate's court in favor of plaintiff and against the defendant for the value of the lost box of collars, namely, $1.10, and for the penalty of fifty dollars, "for failure to adjust the loss within the time required by the act of 1903," with costs of suit (R., 7).

The court in this case assumes that the box of collars was "lost while in possession of the defendant carrier for transportation from Albany, New York, to Barnwell, South Carolina," but the record does not contain any finding or suggestion that the box of collars was ever in the possession of the defendant within the State of South Carolina.

By agreement of counsel noted in the cause, the judgment in this case controls the judgment in five other cases between the same parties (R., 4, 5, 6).

No. 59

Southern Express Company v. McTeer

McTeer sued the Southern Express Company in the magistrate's court of Hampton County, South Carolina, to recover the value, stated at $1.20, of two bottles of whiskey, part of a shipment of five bottles in one box from Covington, Kentucky, consigned to plaintiff at Early Branch, South Carolina, and also to recover the statutory penalty of fifty dollars for defendant's failure to adjust and pay plaintiff's claim for the missing bottles within the time limited by said statute (R., 1). The defendant, not denying the loss of the whiskey or the alleged value thereof, defended upon "certain legal propositions involving * * * a question of inter-state commerce" (R., 2).

The magistrate entered judgment in favor of plaintiff for the full amount of $51.20 demanded, together with costs of suit (R., 2). From this judgment the defendant express

company appealed to the Circuit Court for Hampton County, South Carolina, where the judgment of the magistrate was affirmed. Thereupon the express company further appealed to the Supreme Court of the State of South Carolina, asserting that the provisions of section 2 of the act of 1903, above set forth, are unconstitutional, being "in violation of the Fourteenth Amendment of the Constitution of the United States" and "in violation of the interstate commerce clause of the Constitution of the United States" (R., 4).

Upon hearing, the Supreme Court of the State of South Carolina, finding that the bottles of whiskey in question were "broken and lost while in the possession of the defendant for transportation from Covington, Kentucky, to Early Branch, in South Carolina," and declaring that "the only exception discussed in this court was whether the penalty statute was violative of the interstate commerce clause of the Constitution," affirmed the judgment of said Circuit Court (R., 5).

No. 60

Atlantic Coast Line Railroad Company v. Charles.

R. Keith Charles sued the Atlantic Coast Line Railroad Company in the magistrate's court of Florence County, South Carolina, to recover $18.00, the value of four pockets or sacks of rice, part of a larger shipment and lost while in transit from New Orleans, Louisiana, consigned to the plaintiff at Timmonsville, South Carolina, and also for the further sum of fifty dollars, penalty for failure to adjust and pay his claim for such loss in accordance with the provisions of said statute.

The defendant company demurred to so much of plaintiff's statement of claim as related to the penalty of fifty dollars, on the ground that it appeared on the face of the claim that the loss of the pockets of rice in question occurred

in the course of interstate commerce, and that the statute in question as to such shipments was null and void (R., 2, 3).

This demurrer was overruled, and defendant answered, setting up the interstate character of the shipment in question and alleging the invalidity of the statute as being in contravention of Article I, section 8, of the Constitution of the United States.

The case having come on for trial, the magistrate found that notwithstanding the shortage of the four sacks of rice the railroad company collected freight on the entire shipment of thirty sacks covered by the bill of lading, and thereupon rendered judgment in favor of the plaintiff for the sum of $68.48 (R., 5).

On appeal the Circuit Court for Florence County concluded "that the four sacks of rice did come into possession of the defendant company, for it collected the freight on the four sacks and declared that the rice was missing," and affirmed the judgment of the lower court (R., 8, 9). Upon appeal the judgment of the Circuit Court was affirmed by the Supreme Court of the State (R., 16).

No. 61

Atlantic Coast Line Railroad Company v. von Lehe.

A. von Lehe sued the Atlantic Coast Line Railroad Company in the Magistrate's Court of Colleton County, South Carolina, to recover $5.67, the value of a certain cheese alleged to have been shipped from New York city to himself at Walterboro, South Carolina, and also to recover the statutory penalty of fifty dollars for failure to adjust and pay, in accordance with the statute, his claim on account of the nondelivery of such cheese. The defendant company alleged the invalidity of so much of the State statute as provided for the penalty as being in conflict with the interstate commerce

law of the United States and "in direct conflict with the Federal law in relation to interstate commerce" (R., 3). On the trial it appeared that the cheese in question had never been delivered to the defendant railroad company, but "checked short with us from the Clyde Line Steamship Company" (R., 4). Although the defendant "failed to get the cheese from his connecting carrier," it nevertheless "collected the freight on the cheese" and neglected to adjust the claims for its value. The magistrate entered judgment in favor of the plaintiff for the total amount of $55.67, which included both the value of the cheese and the penalty (R., 5). On appeal to the Circuit Court of Colleton County the judgment of the lower court was affirmed, and on further appeal to the Supreme Court of the State, that court, adopting the finding of the magistrate to the effect "that the cheese never came into the possession of the defendant from the connecting carrier," nevertheless held that as the appeal from the Circuit Court was based "on the sole ground that the penalty act of February, 1903 (24 Stats., 81), is unconstitutional * * * "the appeal must fail," and the judgment of the Circuit Court was affirmed (R., 8).

No. 62

Atlantic Coast Line Railroad Company v. Von Lehe.

A. von Lehe sued the defendant railroad company in the Magistrate's Court of Colleton County, South Carolina, for $5.65, the alleged value of two sacks of grists and two sacks of shorts (or bran) which checked short in a shipment of such commodities from Nashville, Tennessee, consigned to himself at Walterboro, South Carolina, and also to recover the statutory penalty of fifty dollars for failure on the part of the defendant to adjust and pay his claim on account of such shortage.

The defendant by way of answer expressly pleaded " that the loss did not occur on 'its lines,' " and further set up the invalidity of the State statute in view of the commerce provision of the Constitution of the United States. On the trial it developed that the defendant company after an investigation, and after the expiration of ninety days from the filing of the original claim by von Lehe, offered to pay to him the sum of $5.65, being the value of the shortage in the shipment, but declined to pay the statutory penalty of fifty dollars.

This offer to settle was declined by the plaintiff (R., 4). After hearing the magistrate gave judgment in favor of the plaintiff for the alleged value of the shortage and for the fifty dollars' penalty, with costs of suit (R., 5). On appeal the Circuit Court of Colleton County affirmed the judgment of the magistrate.

From this judgment of affirmance the railroad company appealed to the Supreme Court of the State, and upon hearing the judgment of the Circuit Court was affirmed (R., 8).

ASSIGNMENTS OF ERROR.

In connection with the writs of error from this court to the Supreme Court of the State in each of the above cases the plaintiffs in error filed assignments of error in substantially identical terms, the gist of such assignments, so far as important here, being that the Supreme Court of South Carolina in its final judgment rendered in each of said causes erred in holding that the act of the General Assembly of the State of South Carolina above referred to, imposing a penalty of fifty dollars "for failure to adjust and pay within ninety days after filing a claim for loss of or damage to freight coming from without the State," in so far as it is made to apply to interstate carriers doing business in the State of South Carolina, is "an illegal regulation of and burden upon interstate commerce, in violation of Article I, section 8, clause 3, of the Constitution of the United States."

ARGUMENT.

The validity of the penalty clause of Section 2 of the Act of the General Assembly of South Carolina, approved February 23, 1903 (24 Stats. S. C. 81, *ante* p. 2), viewed in the light of the equal protection clause of the Fourteenth Amendment of the Constitution of the United States and solely with reference to a *shipment of goods wholly intra-state*, has heretofore been considered by this court and resolved in favor of the State law.

> Seaboard Air Line Railway Company *v.* Seegers, 207 U. S., 73.

In that case this court, speaking through Mr. Justice Brewer, said:

> "The shipment was wholly intra-state, being from Columbia, S. C., to McBee, S. C., and undoubtedly subject to the control of the State. It is of course unnecessary to consider the validity of the statute when applied to a shipment from without the State."

The writs of error in the cases at bar are brought to test the validity of the same clause of the same statute when applied to shipments of goods from without the State consigned within the State, when viewed in the light of the commerce clause of the Federal Constitution, Article 1, section 8, clause 3.

In each of the cases at bar the shipment with respect to which the loss or damage complained of occurred, was wholly interstate in character.

In the Mazursky (No. 58), Charles (No. 60) and both von Lehe (Nos. 61 and 62) cases there was no evidence either given or offered tending to show that the lost goods ever came into the possession of the Atlantic Coast Line Railroad

Company, the defendant carrier in each case. In each case it clearly appears that the initial point of shipment was off of and beyond the defendant carrier's own lines and that defendant's connection with such shipments were merely that of a connecting and ultimate or delivering carrier. In the first von Lehe case (No. 61), it affirmatively appeared that the lost cheese "checked short with us from the Clyde Line Steamship Company" and that the defendant company had "failed to get the cheese from its connecting carrier." In the second von Lehe case (No. 62) the defendant expressly pleaded "that the loss did not occur on its lines," and no evidence was given tending to prove the contrary.

In the McTeer case (No. 59) the defendant Express Company, having received the shipment in Covington, Kentucky, retained the same until time of its delivery to consignee at Early Branch, South Carolina, and consequently the damage complained of occurred while the goods were actually in defendant's possession.

In the four cases first mentioned, the loss claimed involved but a small part of a larger shipment, and in each case the defendant carrier apparently collected the total amount of the freight charges called for by the through bill of lading. From this circumstance the State tribunals held that it was reasonable to assume that the entire shipment had in fact come into defendant's possession and that the loss complained of occurred subsequently.

In all five of the cases the defendant carriers in one form or another expressly questioned the validity, under the Federal Constitution, of the provisions of the State statute.

In the Seegers case, *supra*, this court, holding that under the Fourteenth Amendment of the Constitution of the United States the classification provided for by this statute was "within the limits of the constitutionality," declared (p. 77) that—

"It is not an act imposing a penalty for the non-payment of debts. As the Supreme Court of South Carolina said, in Best *v.* Seaboard Air Line Railway Company, 72 South Carolina, 479, 484: 'The object of the statute was not to penalize the carrier for merely refusing to pay a claim within the time required, whether just or unjust, but the design was to bring about a reasonably prompt settlement of all proper claims, the penalty, in case of a recovery in court, operating as a deterrent of the carrier in refusing to settle a just claim, and as compensation of the claimant for the trouble and expense of the suit which the carrier's unreasonable delay and refusal made necessary.'

"This ruling of the Supreme Court finds support, if any be needed, in the preamble of the statute, which reads: 'An act to regulate the manner in which common carriers doing business in this State shall adjust freight charges and claims for loss of or damage to freight.'"

* * * * * * *

"While in this case the penalty may be large as compared with the value of the shipment, yet it must be remembered that small shipments are the ones which especially need the protection of penal statutes like this. If a large amount is in controversy, the claimant can afford to litigate. But he cannot well do so when there is but the trifle of a dollar or two in dispute, and yet justice requires that his claim be adjusted and paid with reasonable promptness. Further, it must be remembered that the purpose of this legislation is not primarily to enforce the collection of debts, but to compel the performance of duties which the carrier assumes when it enters upon the discharge of its public functions. We know there are limits beyond which penalties may not go—even in cases where classification is legitimate—but we are not prepared to hold that the amount of penalty imposed is so great or the length of time within which the adjustment and payment are to be made is so short that the act imposing the penalty and fixing the time is beyond the power of the State."

This declaration by the highest court of the State of South Carolina as to the primary object and purpose of the statute here under consideration, adopted and affirmed as it has been by this Court, must be accepted by the parties litigant now here as the final word on that subject, and the discussion of the present cases must proceed with due regard thereto.

It is respectfully submitted on behalf of plaintiffs in error that the provisions of the State law in question when applied to interstate commerce shipments, *i. e.*, to shipments from without the State, constitutes a direct and unreasonable burden upon such commerce and amounts to a regulation thereof, and that with respect to such commerce the provisions of such statute are unconstitutional, null and void.

In Covington and Cincinnati Bridge Co. *v.* Kentucky, 154 U. S., 204, 209, this court, speaking through Mr. Justice Brown, said:

> "The power of Congress over commerce between the States and the corresponding power of individual States over such commerce have been the subject of such frequent adjudication in this court, and the relative powers of Congress and the States with respect thereto are so well defined, that each case, as it arises, must be determined upon principles already settled, as falling on one side or the other of the line of demarkation between the powers belonging exclusively to Congress, and those in which the action of the State may be concurrent. The adjudications of this court with respect to the power of the States over the general subject of commerce are divisible into three classes. First, those in which the power of the State is exclusive; second, those in which the States may act in the absence of legislation by Congress; third, those in which the action of Congress is exclusive and the States cannot interfere at all.
>
> "The *first* class, including all those wherein the States have plenary power, and Congress has no right to interfere, concern the strictly internal commerce of

the State, and while the regulations of the State may affect interstate commerce indirectly, their bearing upon it is so remote that it cannot be termed in any just sense an interference. Under this power, the States may authorize the construction of highways, turnpikes, railways, and canals between points in the same State, and regulate the tolls for the use of the same. Railroad Co. *v.* Maryland, 21 Wall., 456; and may authorize the building of bridges over non-navigable streams, and otherwise regulate the navigation of the strictly internal waters of the State—such as do not, by themselves or by connection with other waters, form a continuous highway over which commerce is or may be carried on with other States or foreign countries. Veazie *v.* Moor, 14 How., 568; The Montello, 11 Wall., 411; S. C., 20 Wall., 430. This is true notwithstanding the fact that the goods or passengers carried or traveling over such highway between points in the same State may ultimately be destined for other States, and, to a slight extent, the State regulations may be said to interfere with interstate commerce. The States may also exact a bonus, or even a portion of the earnings of such corporation, as a condition to the granting of its charter. Society for Savings *v.* Coite, 6 Wall., 594; Provident Institution *v.* Massachusetts, 6 Wall., 611; Hamilton Co. *v.* Massachusetts, 6 Wall., 632; Railway Co. *v.* Maryland, 21 Wall., 456; Ashley *v.* Ryan, 153 U. S., 436; * * * Within the *second* class of cases—those of what may be termed concurrent jurisdiction—are embraced laws for the regulation of pilots; Cooley *v.* Board of Wardens, 12 How., 299; Steamship Co. *v.* Joliffe, 2 Wall., 450; *Ex parte* McNeil, 13 Wall., 233; Wilson *v.* McNamee, 102 U. S., 572; quarantine and inspection laws and the policing of harbors; Gibbons *v.* Ogden, 9 Wheat., 1, 203; New York *v.* Miln, 11 Pet., 102; Turner *v.* Maryland, 107 U. S., 38; Morgan's Steamship Co. *v.* Louisiana, 118 U. S., 455; the improvement of navigable channels; County of Mobile *v.* Kimball, 102 U. S., 691; Escanaba Co. *v.* Chicago, 107 U. S., 678; Huse *v.* Glover, 119 U. S., 543; the regulation of wharfs, piers, and docks; Cannon *v.* New Orleans, 20 Wall., 577; Packet Co. *v.* Keokuk,

93 U. S., 80; Packet Co. *v.* St. Louis, 100 U. S., 423; Packet Co. *v.* Catlett-burg, 105 U. S., 559; Transportation Co. *v.* Parkersburg, 107 U. S., 691; Ouachita Packet Co. *v.* Aiken, 121 U. S., 444; the construction of dams and bridges across the navigable waters of a State: Wilson *v.* Black-Bird Creek Marsh Co., 2 Pet., 245; Cardwell *v.* American Bridge Co., 113 U. S., 205; Pound *v.* Turck, 95 U. S., 459; and the establishment of ferries: Conway *v.* Taylor, 1 Black, 603.

Of this class of cases it was said by Mr. Justice Curtis in Cooley *v.* Board of Wardens, 12 How., 299, 318:

"If it were admitted that the existence of this power in Congress, like the power of taxation, is compatible with the existence of a similar power in the States, then it would be in conformity with the contemporary exposition of the Constitution (Federalist, No. 32), and with the judicial construction, given from time to time by this court, after the most deliberate consideration, to hold that the mere grant of such a power to Congress did not imply a prohibition on the States to exercise the same power; that it is not the mere existence of such a power, but its exercise by Congress, which may be incompatible with the exercise of the same power by the States, and that the States may legislate in the absence of Congressional regulations. (See also Sturges *v.* Crowninshield, 4 Wheat., 122, 193.) But even in the matter of building a bridge, if Congress chooses to act, its action necessarily supersedes the action of the State. *Pennsylvania v. Wheeling and Belmont Bridge Co.*, 18 How., 421. As matter of fact, the building of bridges over waters dividing two States is now usually done by Congressional sanction. Under this power the States may also tax the instruments of inter-state commerce as it taxes other similar property, provided such tax be not laid upon the commerce itself.

"But wherever such laws, instead of being of a local nature and not affecting inter-state commerce but incidentally, are national in their character, the non-action of Congress indicates its will that such commerce shall be free and untrammeled, and the case falls within the *third* class—of those laws wherein the jurisdiction of Congress is exclusive. *Bowman v.*

Chicago, &c., Railway, 125 U. S., 465. Subject to the exceptions above specified, as belonging to the first and second classes, the States have no right to impose restrictions, either by way of taxation, discrimination, or regulation, upon commerce between the States. That, while the States have the right to tax the instruments of such commerce as other property of like description is taxed, under the laws of the several States, they have no right to tax such commerce itself, is too well settled even to justify the citation of authorities. The proposition was first laid down in *Crandall v. Nevada*, 6 Wall., 35, and has been steadily adhered to since. That such power of regulation as they possess is limited to matters of a strictly local nature, and does not extend to fixing tariffs upon passengers or merchandise carried from one State to another, is also settled by more recent decisions, although it must be admitted that cases upon this point have not always been consistent."

Although under the so-called reserved police power the States have power to legislate for the protection of the health, peace, good order, public morals, public safety, and public convenience of their citizens and inhabitants, and while it may be conceded that in the furtherance of the public convenience the States have generally contented themselves with the making of rules and regulations for the government of corporations engaged in the business of transportation or of communicating intelligence, such as railroad and telegraph companies, nevertheless it is well settled that the States cannot legitimately exert their power so as either substantially to prohibit or unnecessarily or unreasonably burden interstate or foreign commerce, nor can such power be exercised so as to directly interfere with or trench upon so much of the power to regulate interstate and foreign commerce as is conferred by the Constitution upon the Congress exclusively.

The rule is plain and comparatively easy of statement. Its application, however, in any given circumstance, seems

fraught with difficulty and subject to doubt. In very many instances, as a result of the mere nature of the thing, the resolution of the difficulty and the solution of the doubt must be left to this court.

While the States may legitimately exercise their police power with respect to matters of interstate commerce, provided such commerce is not unnecessarily burdened thereby, as for instance, by regulating the speed of trains, including interstate trains, within city limits (Erb *v.* Morasch, 177 U. S., 584), or prohibiting the running of freight trains on Sunday (Hennington *v.* Georgia, 163 U. S., 299), or by promoting the safety and comfort of passengers, employees, and persons crossing railroad tracks (Penna. R. R. Co. *v.* Hughes, 191 U. S., 477) or by establishing a rule of evidence or ordaining the character of proof by which a carrier may show that, although it received goods for transportation beyond its own line, nevertheless, by agreement, its liability was limited to its own line (Richmond, &c., R. R. Co. *v.* R. A. Patterson Tobacco Co., 169 U. S., 311), nevertheless, it has been said that what a State may have enacted in such connection, although it may have relation to the public morals, the public health, the public safety or the public convenience, and even though the subject-matter may not be within the exclusive power of Congress, a test, if not the final test, as to the validity of such legislation is that of reasonableness. While this test of reasonableness may be lacking in definiteness, it can be illustrated and deduced, in a measure at least, from decided cases, wherein it has been determined what in that particular case was reasonable or otherwise.

The presumption that a State statute was enacted in good faith for the accomplishment of any of the purposes for which the reserved powers of the State could be exercised, may and ordinarily should be indulged, but nevertheless the validity of such a statute must always be tested by its

natural and reasonable effect. Henderson *v.* New York, 92 U. S., 259. Such presumption cannot control the final determination of the question whether the statute is or is not repugnant to the Constitution of the United States.

> "There may be no purpose upon the part of a legislature to violate the provisions of that instrument, and yet a statute enacted by it, under the forms of law, may, by its necessary operation, be destructive of rights granted or secured by the Constitution. In such cases the courts must sustain the supreme law of the land by declaring the statute unconstitutional and void." Minnesota *v.* Barber, 136 U. S., 313.

Thus, while a State, in the exercise of its police power, may have authority to make reasonable regulations concerning the place, manner, and time of delivery of merchandise moving in the channels of interstate commerce, a statute or order directing carriers to deliver all cars containing interstate freight beyond their right of way to a private siding imposes a direct and onerous burden on interstate commerce. And if such an order is made in favor of a particular person or corporation, it is not only invalid as a regulation of commerce, but it is the assertion of a power concerning a subject covered by acts of Congress which forbid, and provide remedies to prevent, unjust discriminations and the subjecting of shippers to undue disadvantages by carriers engaged in interstate commerce.

McNeill *v.* Southern R. Co., 202 U. S., 543.

And it has been held that a State cannot compel a common carrier engaged in interstate transportation to deliver cars of livestock moving in the channels of interstate commerce at a particular place beyond its own line different from the general place of delivery established by the railway company, the thing sought being to compel delivery of the cars at a particular place and in a particular way.

Central Stock Yards Co. *v.* Louisville, etc., R. Co. (1902), 118 Fed. Rep., 113.

In Gulf, &c., Railway Co. *v.* Ellis, 165 U. S., 150, a statute of the State of Texas imposing an attorney's fee not exceeding ten (10) dollars in addition to costs upon railway companies omitting to pay or satisfy certain classes of claims within thirty days after presentation was held to be unconstitutional, as denying to such companies the equal protection of the laws. In disposing of the case, and referring to the smallness of the attorney's fee permitted to be charged, this court, speaking through Mr. Justice Brewer, said:

> "The matter of amount does not determine the question of right, and the party who has a legal right may insist upon it, if only a shilling be involved. As well said by Mr. Justice Bradley in Boyd *v.* United States, 116 U. S., 616, 635, 'Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of persons and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizens and against any stealthy encroachments thereon. Their motto should be *obsta principiis*.'"

In Atchison, Topeka and Santa Fe Railroad Co. *v.* Matthews, 174 U. S., 96, wherein a statute of the State of Kansas which provided for the allowance of "a reasonable attorney's fee" in connection with judgment against railway companies for damages by fires caused by the operations of the company was held to be constitutional and valid, reference was made in the course of the argument to the case of Gulf, &c., Co. *v.* Ellis, next *supra*, and this court, again speaking through Mr. Justice Brewer, said:

> "In that case a statute of Texas allowing an attorney's fee * * * was held to be simply a

statute imposing a penalty on railroad corporations for failing to pay certain debts, 'and not one to enforce compliance with any police regulations. * * * Compelling the payment of debts is not a police regulation.' We see no reason to change the views there expressed, and if the statute before us were the counterpart of that, we should be content to refer to that case as conclusive." * * *

"The purpose of this statute is not to compel the payment of debts, but to secure the utmost care on the part of railroad companies to prevent the escape of fire from their moving trains."

* * * * * * *

"Its monition to the railroads is not, pay your debts without suit or you will, in addition, have to pay attorney's fees; but rather see to it that no fire escapes from your locomotives, for if it does you will be liable, not merely for the damages it causes, but also for the reasonable attorney's fees of the owner of the property injured or destroyed" (pp. 98, 99).

In Central of Georgia R. Co. *v.* Murphey, 196 U. S., 194, wherein was drawn in question the validity of a statute of the State of Georgia quite similar in its terms to the provisions of section 1749 of the Code of South Carolina, 1902, referred to in the proviso to the law of 1903 now before the court, it was urged that the Georgia statute requiring initial or connecting carriers on application of the shipper "to trace" and "inform" within thirty days "when, where and how" the loss or damage complained of occurred, was not a burden on interstate commerce, and that it merely established a rule of evidence, whereby a legal presumption was to be deduced from the failure of the carrier "to trace" and "inform" as required. This court, however, speaking through the late Mr. Justice Peckham said:

"The question for us to decide is whether the statute, when applied to an interstate shipment of freight, is an interference with, or a regulation of, interstate commerce and therefore void," and it was held that that statute when

applied to inter-state commerce was "a violation of the commerce clause of the Federal Constitution."

Referring to the argument as to the convenience of such a statute to shippers owing to the great difficulty in identifying the particular carrier upon whose road the loss occurred, it was said:

> "And a provision making the initial or any connecting carrier liable in any event for any loss or damage sustained by the shipper, on account of the negligence of any one of the connecting lines, would also be convenient for the shippers, but it would hardly be maintained, when applied to the inter-state shipment of freight, that a State statute to that effect would not violate the commerce clause of the Federal Constitution" (p. 204).
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> * * * * * * *
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> "The loss or damage might occur on the line of a connecting carrier outside of the State where the shipment was made (as was the case here), and we do not perceive that the initial carrier has any means of obtaining the information desired, not open to the shipper. The railroad company receiving the freight from the shipper has no means of compelling the servants of any connecting carrier to answer any question in regard to the shipment, or to acknowledge its receipt by such carrier, or to State its condition when received. And when it is known by the servants of the connecting company that the object of such questions is to place in the hands of the shipper information upon which its liability for the loss or damage to the freight is to be based, it would seem plain that the information would not be very readily given, and the initial or other carrier could not compel it. The effect of such a statute is direct and immediate upon interstate commerce. It directly affects the liability of the carrier of freight destined to points outside the State, with regard to the transportation of articles of commerce. * * * and it is not of that class of State legislation which has been held to be rather an aid to than a burden upon such commerce."
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> * * * * * * *

> "The power to regulate the relative rights and duties of all persons and corporations within the limits of the State cannot extend so far as to thereby regulate interstate commerce."

In Houston and Texas Central Railroad Company *v.* Mayes, 201 U. S., 321, a statute of the State of Texas, construed by the highest courts of that State as requiring interstate railroad companies to furnish upon demand and within a time arbitrarily fixed by the statutes cars for interstate transportation in unlimited numbers and without regard to the circumstances of the company, under severe penalty for failure in such regard, was held on writ of error from this court to the Court of Civil Appeals for the State of Texas to transcend the legitimate powers of the legislature, and the judgment of the Court of Civil Appeals of Texas was reversed. In that case the court, speaking through Mr. Justice Brown, said:

> "That States may not burden instruments of interstate commerce, whether railways or telegraphs, by taxation, by forbidding the introduction into the State of articles of commerce generally recognized as lawful, or by prohibiting their sale after introduction, has been so frequently settled that a citation of authorities is unnecessary. Upon the other hand, the validity of local laws designed to protect passengers or employés, or persons crossing the railroad tracks, as well as other regulations intended for the public good, are generally recognized. An analysis of all the prior important cases upon this point will be found in the opinion of the court in Cleveland, &c., R. R. *v.* Illinois, 177 U. S., 514, wherein a requirement that express trains intended only for through passengers should stop at every county seat, when ample accommodations were provided by local trains, was held to be an unreasonable burden. Other similar cases regulating the stoppage of trains are Illinois Central R. R. Co. *v.* Illinois, 163 U. S., 142; Gladson *v.* Minnesota, 166 U. S., 427; Lake Shore, &c., Ry. Co. *v.* Ohio, 173 U. S., 285. In the

same line is the more recent case of Wisconsin, &c., R. R. Co. *v.* Jacobson, 179 U. S., 287.

"While there is much to be said in favor of laws compelling railroads to furnish adequate facilities for the transportation of both freight and passengers, and to regulate the general subject of speed, length and frequency of stops, for the heating, lighting and ventilation of passenger cars, the furnishing of food and water to cattle and other live stock, we think an absolute requirement that a railroad shall furnish a certain number of cars at a specified day, regardless of every other consideration except strikes and other public calamities, transcends the police power of the State and amounts to a burden upon interstate commerce. It makes no exception in cases of a sudden congestion of traffic, an actual inability to furnish cars by reason of their temporary and unavoidable detention in other States, or in other places within the same State. It makes no allowance for interference of traffic occasioned by wrecks or other accidents upon the same or other roads, involving a detention of traffic, the breaking of bridges, accidental fires, washouts, or other unavoidable consequences of heavy weather.

"A dereliction of the road in this particular, which may have occurred from circumstances wholly beyond the control of its officers, is made punishable not only by damages actually incurred by the shipper in the detention of his stock, but in addition thereto by an arbitrary penalty of $25 per car for each day of detention. The penalty which was assessed in this case, though the detention was only for one day, amounted to nearly as much as the damages, and might in another case amount to far more. * * *

"In this connection the recent case of Central, &c., R. R. Co. *v.* Murphey, 196 U. S., 194, is instructive. In that case we held that the imposition by a State statute, upon the initial or any connecting carrier, of the duty of tracing the freight and informing the shipper, in writing, when, where or how, and by which carrier the freight was lost, damaged or destroyed, and of giving the names of the parties and their official position, if any, by whom the truth of

the facts set out in the information could be established, is, when applied to interstate commerce, a violation of the commerce clause of the Federal Constitution; and an act of the legislature of Georgia imposing such a duty on common carriers was held void as to shipments made from points in Georgia to other States.

"Although the statute in question may have been dictated by a due regard for the public interest of the cattle raisers of the State, and may have been intended merely to secure promptness on the part of the railroad companies, in providing facilities for speedy transportation, we think that in its practical operation it is likely to work a great injustice to the roads, and to impose heavy penalties for trivial, unintentional, and accidental violations of its provisions, when no damages could actually have resulted to the shippers. * * *

"While railroad companies may be bound to furnish sufficient cars for their usual and ordinary traffic, cases will inevitably arise where by reason of an unexpected turn in the market, a great public gathering, or an unforeseen rush of travel, a pressure upon the road for transportation facilities may arise, which good management and a desire to fulfill all its legal requirements cannot provide for, and against which the statute in question makes no allowance.

"Although it may be admitted that the statute is not far from the line of proper police regulation, we think that sufficient allowance is not made for the practical difficulties in the administration of the law, and that, as applied to interstate commerce, it transcends the legitimate powers of the legislature" (pp. 328-31).

We submit with deference that the conclusions reached in the foregoing cases, when applied to the cases at bar, require the reversal of the several judgments complained of therein.

It is true that in its general terms section 2 of the act of 1903 seemingly embraces only "claims for loss or damage to property while in the possession of such common carrier,"

but the *proviso* declares that "no common carrier shall be liable under this act *for property which never came into its possession*, IF *it complies* with the provisions of section 1710," &c., of the South Carolina Code, which requires common carriers "to trace" and "inform."

With respect to this *proviso* the Supreme Court of South Carolina, in Skipper *v.* Seaboard, &c., Co., 75 So. Car., 276, distinguished it from the Georgia statute condemned in the Murphey case, *supra*, and in its opinion in the Charles case (No. 60) seems to intimate that its provisions may be upheld as constitutional, although declaring that the court was not called upon to consider that question in the then pending case.

If, however, the South Carolina statute can, by implication or *presumptions*, be construed so as to mulct a common carrier for failure to adjust and pay within ninety days claims for loss or damage to interstate shipments, when the property itself never in fact had come into its possession, it would seem that the conditions of exemption provided in the *proviso* would be as obnoxious to the Federal Constitution here as they were held to be in the Murphey case, *supra*, and if it be thought that the proviso is separable from the body of the act, then the inflexibility of the general provisions, in the light of their application by the State courts, become even more intolerable and, under the combined principles of Railroad Co. *v.* Ellis and Railroad Co. *v.* Mayes cases, *supra*, such provisions should be declared to be unconstitutional and void.

Even assuming that the statute should be strictly limited to apply only to cases of claims for loss or damage to interstate shipments while "in the possession of" the carrier, the requirement to adjust and pay such claims within the time limited, and at all events, when the loss or damage may have occurred in a distant State and under unknown or obscure conditions, necessitating prolonged and tedious search for witnesses and like, no exception or provision being made

in the statute for strikes or other public calamities, wrecks or detentions of traffic or the mails, or derelictions which may occur from circumstances wholly beyond the control of the company's officers or agents is clearly unreasonable.

It declares that every claim for such loss or damage in shipments from without the State *shall be adjusted and paid* within ninety days after claim has been filed with company's agent at point of destination of shipment—otherwise "a penalty of fifty dollars for each and every such failure."

The statute as construed and applied by the State courts to interstate shipment constitutes an unreasonable burden upon interstate commerce.

The case of Western Union Telegraph Co. *v.* James, 162 U. S., 650, is not opposed in principle to the conclusions reached in the cases above relied upon. The judgment sustaining the penalty statute in that case was vested solely upon the duty imposed upon the telegraph company by general law to impartially and in good faith and with due diligence to deliver to the persons addressed messages actually received at offices of destination.

It is idle to say that the imposition of a penalty in an amount disproportioned to the amount of the loss or damage sustained for failure to pay the claim within a limited time, will conduce to the better conduct of interstate commerce or will in anywise aid or better it. When the claim under the statute is capable of being filed, the commerce feature of the transaction, in so far at least as the duty to transport and deliver is concerned, has ended. The obligation then remaining upon the carrier, if any, is only to satisfy any loss or damage which may have occurred due to its negligence or to the breach of its contract of carriage. The threat of the penalty is, in truth, but an admonition to pay without suit or stand to pay the penalty. Compelling the payment of debts incident to transactions respecting interstate commerce is not a police regulation which it is competent

for the States in the exercise of their reserved powers to either enact into valid law or to otherwise enforce.

As construed by the Supreme Court of South Carolina this statute was designed to control and regulate the carrier in its transportation of the interstate shipment. This brings the statute within the reasoning of the court in the case of American Express Co. *v.* Iowa, 196 U. S., 133 (49 L. ed., 417), where it was held that liquors shipped from one State into another under a C. O. D. contract, could not be seized until they had actually been delivered to the consignee, because they were still in the course of interstate transportation until so delivered. In that case the State statute had it been allowed to operate, would have regulated the completion of the interstate movement of such commodity.

The object of the statute here under consideration is to regulate and control the completion of the interstate movement of any article moving in interstate commerce. If a State has no authority to seize liquors that have actually reached their destination in such State, but are still in the hands of the interstate carrier, it has no authority to penalize such carrier for the loss of or damage to such freight before it reaches the hands of the consignee.

That case was followed in the cases of Adams Express Co. *v.* Kentucky, 206 U. S., 129 (51 L. ed., 987), and Adams Express Co. *v.* Kentucky, No. 141 O. T., 1908, decided May 24, 1909. In the latter case this court declared unconstitutional the statute of the State of Kentucky that penalizes a common carrier for delivering liquor moving in the course of interstate transportation to a person known to be an inebriate, and declared, following its rule in Atlantic C. L. R. Co. *v.* Wharton, 207 U. S., 328 (52 L. ed., 230), that any exercise of State authority, in whatever form manifested, which directly regulates interstate commerce is repugnant to the commerce clause of the Constitution.

Under this statute, as construed by the Supreme Court of South Carolina, a common carrier may be penalized for its failure to adjust a claim for damages growing out of injury to an interstate shipment if such injury occurs on its line, even though in another State than South Carolina. The Supreme Court of South Carolina has declared that the payment of such a claim is merely an incident of the transportation.

Seegers *v.* Seaboard Air Line R. Co., 73 So. Car., 71.

But payment of the claim necessarily contemplates and involves a preceding investigation.

If it be true, as held by the Supreme Court of South Carolina, that the investigation and adjustment of claims is but an incident of such transportation, how can the conclusion that the regulations of such claim adjustment should properly be prescribed by Congress, and that the States are powerless to provide for such regulation, be escaped?

Congress has legislated extensively in the field of interstate commerce, its enactments command the performance of a great variety of duties as well as prohibit many practices and customs heretofore indulged in by common carriers in the prosecution of interstate commerce. The failure of Congress to legislate with respect to the period within which claims such as those contemplated by the South Carolina statute should be adjusted, would seem to be tantamount to a declaration that the matter of such adjustments should be left free from restrictive regulations.

It is readily conceivable that the payment of a claim connected with the interstate transportation of goods before it has been developed by proper investigation to be legitimate and in good conscience payable, might be made to border on the ancient practice of rebating, which has been severely condemned by Federal laws. (See Union Pac. Co. *v.* Goodridge, 149 U. S., 680; 37 L. Ed., 896.) The Interstate Commerce Commission has recently so ruled. It may result, therefore, that under the South Carolina statute a carrier can and may be penalized for failing to settle within ninety

days a claim which, notwithstanding all expedition, has required ninety-one days to investigate, the payment of such claim before the completion of such investigation being condemned both by the Inter-state Commerce Commission and the courts.

Again, the Inter-state Commerce Act, in section 3, prohibits carriers engaged in inter-state commerce from making or giving any undue or unreasonable preference or advantage to any particular locality, or to subject any particular locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. If it should be held to be within the power of the State of South Carolina to prescribe the period within which claims growing out of the inter-state transportation of property must be adjusted, under penalty for failure so to do, other States through which the plaintiffs in error operate may prescribe different and shorter periods; and thus it might occur that while in South Carolina such claims are required to be adjusted in ninety days, the period is sixty days in North Carolina, forty days in Virginia, thirty days or even less in Georgia.

Under such conditions it cannot be doubted that in seasons when the number of such claims may be unusually heavy, preference in their investigation and adjustment will be given to claimants residing in States where the period allowed for such adjustment is the shortest. Would such preference constitute an undue preference under the Inter-state Commerce Laws?

Again, a carrier being limited by a State statute to a period of ninety days within which to adjust and pay claims arising out of inter-state shipments, enters upon the investigation of such a claim, but finds that, notwithstanding the exercise of all possible expedition and owing to circumstances beyond its control, it will not be possible to complete the investigation until after the expiration of the time limited. Although the investigation so far as it may have progressed may indicate that the claim is not well founded, nevertheless in view of the uncertainty upon that point and the inability

to tell what further investigation may develop, would not the carrier be justified in paying the $1 20 claimed rather than to risk the addition of the penalty of $50 for delay?

If the carrier should pay under such conditions would not the Inter-state Commerce Commission have authority to proceed against it for derelictions under the provisions of Federal law relating to undue preferences and the like? If so, how can it be possible in such matters, pertaining, as they do, to inter-state commerce, for both the United States and the States to occupy the same field?

In this connection it is both interesting and worthy of note that since the rendition by this court of its opinion and judgment in the case of Seaboard Air Line R. Co. *v.* Seegers, *supra*, viz., November 7, 1907, the State of South Carolina by an act approved February 26, 1908 (25 Stats. S. C., 1977), has amended the statute here under consideration by making it apply to both "property and baggage," and by reducing the periods of time allowed for the adjustment and payment of claims for loss or damage thereto from forty to *thirty* days in cases of shipments wholly within the State, and from ninety to *forty* days in cases of shipments without the State.

It is respectfully submitted the judgment of the Supreme Court of South Carolina in each of the cases at bar should be reversed and the cases remanded to that court with such further and appropriate instructions as to this honorable court may appear to be just and right.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1909.

THE ATLANTIC COAST LINE RAILROAD COMPANY, *Plaintiff in Error,*

vs.

B. MAZURSKY—No. ~~254~~ 58
Defendant in Error,

The ~~A. C. L.~~ So Express COMPANY vs. E. E. McTEER, No. ~~255~~ 59

The A. C. L. COMPANY vs. R. KEITH CHARLES, No. ~~258~~ 60

The A. C. L. COMPANY vs. A. VON LEHE, No. ~~259~~ 61

The A. C. L. COMPANY vs. A. VON LEHE, No. ~~260~~ 62

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

BRIEF OF J. P. K. BRYAN,
Of Counsel for Plaintiff in Error.
& Clyde S. S. Co

WALKER, EVANS & COGSWELL CO., CHARLESTON, S. C.

Manchester Liners
and others
Ocean Carriers

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vs.

B. MAZURSKY, No. 254,
Defendant in Error.

The A. C. L. COMPANY *vs.* P. E. McTEER, No. 255.

The A. C. L. COMPANY *vs.* R. KEITH CHARLES, No. 258.

The A. C. L. COMPANY *vs.* V. VON LEHE, No. 259.

The A. C. L. COMPANY *vs.* V. VON LEHE, No. 260.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

BRIEF OF J. P. K. BRYAN,
Of Counsel for Plaintiff in Error.

STATEMENT OF CASE.

The question at issue in this writ of error is the validity of the statute of the State of South Carolina, quoted below, which we contend is a regulation of interstate commerce, and therefore void. The statute is as follows:

"SEC. 2: *That every claim for loss or damage to property while in the possession of such common carrier shall be adjusted and paid within forty days, in case of shipments wholly*

within this State, and within **ninety days** *in case of shipments from* **without this State,** *after the filing of such claim with the agent of such carrier at the point of destination of such shipment: PROVIDED, That no such claim shall be filed until after the arrival of the shipment, or of some part thereof, at the point of destination, or until after the lapse of a reasonable time for the arrival thereof. In every case such common carrier shall be liable for the amount of such loss or damage, together with interest thereon from the date of the filing of the claim therefor until the payment thereof. Failure to adjust and pay such claim within the periods respectively herein prescribed shall subject each common carrier so failing to a* **penalty of fifty dollars** *for each and every such failure, to be recovered by any consignee or consignees aggrieved in any Court of competent jurisdiction.*"

Tr. of Record, p.

Construing the statute in *Seegers v. Ry.*, 73 *S. C.*, 71, 73, 52, *S. E.*, 797, the Supreme Court of South Carolina said: "The duty to make prompt settlement for loss or damage to goods is but an incident of the duty to transport and deliver safely and with reasonable diligence. The statute in question was designed to effectuate an important public purpose, viz.: to compel the common carrier to perform with reasonable diligence the *duty which peculiarly appertains to his business as a carrier of freight.* The penalty is but a means to that end."

"While it is not easy to define the exact limits of the operation of State laws, as affecting interestate commerce, we have no hesitation in saying that the statute in question, as it affects carriers doing business in this State who fail or refuse to adjust and pay the loss or damage to goods while in their possession, is no unlawful interference with interstate commerce, even as applied to an interstate shipment. The penalty imposed is for a delict of *duty* appertaining to the business of a common carrier."

ASSIGNMENT OF ERROR.

1. **That the said Supreme Court of South Carolina, in its final judgment rendered in said cause, erred in holding that the Act of the General Assembly of the State of South Carolina, approved the 23d day of February, 1903,**

(24 Stat. at L., p. 81), entitled "An Act to Regulate the Manner in which Common Carriers doing business in this State shall adjust Freight Charges and Claims for Loss of or Damage to Freight," which imposes a penalty of fifty dollars for failure to adjust and pay within ninety days after filing a claim for loss of or damage to freight coming from without the State, so far as it affects carriers doing business in the State of South Carolina who fail or refuse to adjust and pay the loss of or damage to goods either proved or PRESUMED to have come into their possession, is not an unlawful interference with interstate commerce, even as applied to an interstate shipment; whereas said Court should have held that said Act was an illegal regulation of and burden upon interstate commerce, in violation of Article 1, Sec. 8, Clause 3, of the Constitution of the United States.

This writ of error involves the question of the validity of this statute of the State of South Carolina on the ground that the same is a regulation of interstate and foreign commerce. It is to be noted that the language of the statute applies to shipments *from without* the State of South Carolina; that is, shipments from any part of the world arriving in the State of South Carolina. It will be further noted that the statute itself, in the title thereof, is a statute "to *regulate*." It is moreover a statute regulating the relations between the consignee and the interstate and foreign carrier, insomuch as it places a penalty upon the carrier in interstate and foreign commerce as to his action in respect to his liability under the contract of carriage.

It is further to be noted that the statute itself fixes a time limit; that is, of forty days for intrastate commerce, and ninety days for interstate or foreign commerce; that is, shipments from without the State. The fixing of some definite time is with the evident intention, as recognized by the State Court in the construction of the statute, to give an opportunity for examination of the claim that it made. Originally by the statute the time limited for intrastate commerce was *forty* days, and interstate and foreign commerce, ninety days. This time has, however, been changed by recent amendment to the South Carolina statute, in the case of interstate and foreign com-

merce, to *forty days*, 25 Stat. at Large, S. C., p. 1077; Act Gen. Ass., S. C., 20 Feb., 1908. In other words, the State has assumed the power to fix the time in all cases, and having in the original statute first fixed the time for examination and payment of the claim in interstate and foreign commerce at ninety days, on the manifest theory that the time for tracing, and examining a claim of loss and damage was necessarily longer in interstate and in foreign commerce than the examination and investigation and tracing of a claim in intrastate commerce, the South Carolina Legislature has now arbitrarily changed its mind, and has fixed forty days as a final limit in all cases for investigation and tracing and payment of a claim in interstate and foreign commerce, on pain of incurring a penalty of fifty dollars.

Of course, if the power is conceded to the State to legislate at all upon this subject, its discretion could not be questioned, however arbitrary and injurious its legislation in fixing a wholly inadequate time might be to interstate and foreign commerce. If the State's power is indeed unquestioned, and if this statute were merely a police regulation, then the State could, as it has already reduced the time from ninety days to forty days, still further reduce the time in both interstate and foreign commerce to twenty, or even to *ten* days, even though in truth, and in fact, such time afforded no reasonable opportunity whatsoever to trace, and investigate and examine the claim.

As a matter of fact, as the State statute now stands, allowing, by the recent amendment, only forty days for examination, tracing and investigation in interstate and foreign commerce, it is on its face a burden on interstate and foreign commerce, in which there is certainly more time required for the examination and tracing of loss and damage to freight than in intrastate commerce, in which the State has allowed forty days as a reasonable time. On its face, therefore, the statute is presumptively wholly arbitrary and injurious to interstate and foreign commerce, and indicates an inability on the part of the State Legislature to fully comprehend and understand the necessities of interstate and foreign commerce in the particular of time consumed in the fair and reasonable investiga-

tion of claims of loss and damage in shipments.

This is apparent also from the facts that are the common knowledge of the commercial world, for, in foreign commerce especially, forty days is wholly inadequate.

For example, into the port of Charleston there comes jute from Calcutta by the cargo; from Japan there comes rice in bags; from China there comes tea; from Iquique, on the west coast of Chili, there comes nitrate of soda in bags and bulk. Now, if a claim of loss or damage were made upon the carrier on a cargo of jute from Calcutta to Charleston, and the investigation of the claim required the carrier to ascertain if the cargo was short in delivery, or as to the condition of the cargo upon loading, or as to the condition of any of the packages in loading, on an issue of fact, it would take fifty-six days for a letter to go from Charleston to Calcutta and an answer to be received in Charleston. (See U. S. Postal Guide, 1909, July issue, pages 169-170, giving the approximate time in course of post from New York to the various cities of the world by mail.) And yet, before a letter could even reach Calcutta and a reply be had, the penalty would be imposed upon the carrier before an opportunity was afforded of examination and determination as to the rightfulness of the claim.

So, in the case of nitrate of soda from Iquique, on the west coast of Chili, when a cargo in bags comes to Charleston, it would require sixty days for a letter to go via New York and Panama to Iquique and return.

Thus, in this statute no reasonable opportunity for examination is afforded, because the time expires before the examination can reasonably be made on any of the questions at the port or place of loading, which involves the right delivery of the shipment or cargo, both as to condition and amount and the circumstances of the loading and other material facts which always enter into the question of a liability of a carrier which are accessible only at the port or point of loading, and when any question arises are sought for at the point or port of loading, as well as in the course of the voyage and at the port of delivery.

The same question arises also as to a cargo of tea from China to Charleston or New York. In that case it requires fifty-four days for a letter to go and come from Charleston via

San Francisco. And the commerce of this whole country, and the relation of the carrier to the consignee, and his duty under the contract and his rights under the contract, under the customs of the commercial world are changed, and liabilities imposed wholly novel and burdensome and injurious to the whole course of business as heretofore existing.

So, also, in interstate commerce, the time necessary for examination and tracing of loss and damage to shipments from far distant states and territories and outlying districts and colonial possessions—islands of the sea—could only reasonably be fixed by Congress.

Again, the State of South Carolina has not only reduced the time limit from ninety to forty days for interstate and foreign commerce, but it has gone further and has denied in its Courts the carrier's right to testify or contend that forty days' time-limit is inadequate. Its Courts have declared that the State's sovereign discretion in fixing a time-limit, that may be wholly inadequate and oppressive, and denying an opportunity of investigation and tracing lost or damaged freight, cannot be varied by testimony, and thus the carrier is helpless. In the case of *Moody v. Railway*, 79 S. C., 297-299, the Supreme Court of South Carolina, in 1907, held that "the opinion of witnesses, that forty days (fixed by "statute) was not sufficient to trace freight damaged or de-"stroyed," was incompetent.

If the State of South Carolina has the power to regulate this world-wide commerce, if it has the power to affect interstate or foreign contracts of transportation by changing its fixed liabilities and imposing penalties for its breach, or to compel by regulation its due fulfilment, then this statute would be valid, it being a statute with declared purpose to "*regulate*," and actually resulting in a regulation and burden to interstate and foreign commerce. Moreover, if the State of South Carolina could regulate in this way, then each State could regulate in the same way, and fix, in this or any other arbitrary way, a time limit even more drastic than that fixed by the State in the later statute of 1908, fixing forty days; and in this way there would be interminable confusion as to the different regulations, some of which might be fair and others

might be unfair, and amount to confiscation in denying a reasonable time for tracing, investigation and examination of the claim so as to determine whether or not it be just.

Of course, the State in the management of its own internal concerns and commerce can, in its sovereign discretion, regulate its own commerce as part of its domestic life, but this statute goes beyond all constitutional limit, and embraces the whole merits of claims and controversies in international and interstate commerce. No matter what the commercial treaties of the United States may now or hereafter be with foreign countries; no matter what the customs or necessities of the commercial world in international trade or commerce, this local statute, wholly novel in its conception and drastic measures, affects the whole course of external commerce, which is regarded as a matter of national concern always. And this is peculiarly a matter of national concern to be uniform in its provisions and in its application over against the merchants and ships of foreign nations, to be enacted and enforced with all the responsibility of international obligation and good faith, and national duty arising out of the "favored nation" clauses of our treaties.

The final test of this whole question is whether the legislature is a burden on commerce; whether it directly affects interstate or international commerce. This is a test upon which the decisions of this Court have proceeded.

In *Central R. R. Co. v. Murphy*, 196 *U. S.*, 194, the Court decided that the statute making the initial carrier liable if it did not trace and ascertain the cause of the loss or delay for damage, and give the information to the shipper or consignee, was invalid, because it was impossible to get the information, and that such a statute was unconstitutional and a burden upon the interstate commerce.

In the case at bar the effort is to make the terminal carrier liable, with a limited time within which to get the information necessary to determine its liability, even if the time limit be wholly inadequate to trace and investigate, as it is contended by the carrier, and as we have shown in foreign commerce, it is wholly arbitrary, and that it is known to be impossible to get any information whatever from loading ports within forty days, to determine the liability, if any.

These considerations show that the State is not, either by its

experience or its responsibility to the outer world, its merchants and carriers, the proper authority to fix and determine those principles of foreign and interstate trade which may surely aid and protect commerce, and which may not operate disastrously as a burden to the same. And it is thus revealed to us that the only governmental authority that can truly state the rules for regulation of this commerce in the particular at issue here, so that it shall not affect injuriously the interstate commerce and foreign trade, would be that authority which has power over the whole subject matter by the Constitution, and in its larger practical experience and wider vision may wisely legislate, if indeed any legislation is necessary.

LAW.

This Court has settled finally the following principles:

1. The power of Congress to regulate commerce among the States is exclusive. Brown v. Maryland, 12 Wheat., 419, 449; Cook v. Pennsylvania, 97 U. S., 574. Interstate transportation is interstate commerce. State Freight Tax Case, 15 Wall., 275; United States v. Freight Association, 166 U. S., 312.

2. The clear intention of the Constitution was to confer the power to regulate interstate commerce exclusively upon Congress, and not to divide the power between the State Legislatures and Congress. One of the chief objects of the Constitution was to rid commerce of the conflicting, vexatious and burdensome restrictions which, under the articles of confederation, had been imposed by the various States. Gibbons v. Ogden, 9 Wheat., 1; Passenger Cases, 7 How., 383; State Freight Tax Case, 15 Wall, 270; Hall v. DeCuir, 95 U. S. 485; Wabash R. R. Co. v. Illinois, 118 U. S., 557; Pickard v. Pullman Co., 117 U. S., 34, 40; Fargo v. Michigan, 121 U. S., 238; Leloup v. Mobile, 127 U. S., 640; Almy v. California, 24 How., 169; Woodruff v. Parham, 8 Wall, 123; American Express Co. v. Iowa, 196 U. S., 133.

3. The particular matter sought to be regulated by the South Carolina statute is in no sense local, but is national in character and importance, and obviously admits of national regulation. From the first, certain State laws relating to pilotage, quarantine, etc., were sustained notwithstanding an incidental effect upon interstate and foreign commerce. Hall v.

Dec'dir, 95 U. S. 485, 487; Cooley v. Board of Wardens, 12 How., 299; Covington Bridge Co. v. Kentucky, 154 U. S., 204, 209. See also Wilson v. State, 91 U. S., 275; Robbins v. Shelby Taxing District, 120 U. S., 489; County of Mobile v. Kimball, 102 U. S., 691; Gloucester Ferry Co. v. Pennsylvania, 114 U. S., 196; Brown v. Houston, 114 U. S., 622; Philadelphia Steamship Co. v. Pennsylvania, 122 U. S., 326; Louisville & Nashville Ry. v. Eubank, 184 U. S., 27; Illinois Central Ry. v. Illinois, 163 U. S., 142; Cleveland, etc., Ry. v. Illinois, 177 U. S., 514.

4. If, indeed, the State ever possessed such power, it was only until Congress should act, and Congress having assumed it, the State is no longer entitled to exercise it. Since Congress has acted and has provided a system of laws regulating railroads and steamships as instruments of interstate and foreign commerce in great detail, it has excluded the power of the States to act upon the subject. Bowman v. Chicago, etc., Ry., 125 U. S., 465; Sinnot v. Davenport, 22 How., 227.

5. The attempted defense of State legislation in violation of the Federal Constitution, that it is within the police power, is untenable in this case. Railroad Co. v. Husen, 95 U. S., 465; License Cases, 5 How., 504, 599; Chy Lung v. Freeman, 92 U. S., 275; Robbins v. Shelby County District, 120 U. S., 489.

6. The South Carolina statute as applied in this case plainly regulates interstate commerce, and is therefore void.

> Tel. Co. v. Pendleton, 122 U. S., 347, 358.
> Ry. Co. v. Murphy, 196 U. S., 194.
> Ry. Co. v. Mayes, 201 U. S., 331.
> Express Co. v. Iowa, 196 U. S., 133.
> Ry. Co. v. Wharton, 207 U. S., 328.
> Express Co. v. Kentucky, 206 U. S., 129.

In Houston & Gen. R. R. v. Hayes, 201 U. S., 331, the Court say:

"Although it may be admitted that the statute is not far from the line of proper police regulation, we think that sufficient allowance is not made for the *practical* difficulties in the administration of the law, and that, as applied to interstate

commerce, it transcends the legitimate powers of the Legislature."

It is the *practical* difficulty, as we have seen, that makes State legislation on this particular subject matter a burden on interstate and foreign commerce.

In *Houston & Tex. Cen R. R. Co v. Mayes, 201 U. S., page 321*, the Court held:

"An absolute requirement that a railroad engaged in interstate commerce shall furnish a certain number of cars on a special day to transport merchandise to another State, regardless of every other consideration except strikes and other public calamities, transcends the police power of the States, and amounts to a burden upon interstate commerce; and Articles 4407-5000, Rev. Stat. Texas, being such a requirement, are, when applied to interstate commerce shipments, void as a violation of the commerce clause of the Federal Constitution."

In the same case, 201 U. S., 330, the Court uses the following language, which is directly applicable to the case at bar:

"In this connection the recent case of Central, etc., R. R. Co. v. Murphy, 196 U. S., 194, is instructive. In that case we held that the imposition by a State statute upon the initial or any connecting carrier of the duty of tracing the freight and informing the shipper, in writing, when, where or how, and by which carrier the freight was lost, damaged or destroyed, and of giving the names of the parties and their official position, if any, by whom the truth of the facts set out in the information could be established, is, when applied to interstate commerce, a violation of the commerce clause of the Federal Constitution and an Act of the Legislature of Georgia, imposing such a duty on common carriers was held void as to shipments made from points in Georgia to other States.

"Although the statute in question may have been dictated by a due regard for the public interest of the cattle raisers of the State, and may have been intended merely to secure *promptness* on the part of the railroad companies in providing facilities for speedy transportation, we think that in its practical operation it is likely to work a great injustice to the roads, and to impose heavy penalties for trivial, unintentional

tional and accidental violations of its provisions, when no damages could actually have resulted to the shippers."

In the leading case of *Central of Georgia Railway Co v. Murphy, 196 U. S.*, 194-5, this Court held:

"The imposition, by a State statute, upon the initial or any connecting carrier of the duty of tracing the freight and informing the shipper, in writing, when, where, how and by which carrier the freight was lost, damaged or destroyed, and of giving the names of the parties and their official position, if any, by whom the truth of the facts set out in the information can be established, is, when applied to interstate commerce, a violation of the commerce clause of the Federal Constitution; and Secs. 2317, 2318 of the Code of Georgia, of 1895, imposing such a duty on common carriers, is void as to shipments made from points in Georgia to other States. Richmond & Alleghany R. R. Co. v. Tobacco Company, 169 U. S., 311, distinguished."

And in that case the Court reaffirmed the principle:

"The power to regulate the relative rights and duties of all persons and corporations within the limits of the State cannot extend so far as to thereby regulate interstate commerce. The police power of the State does not give it the right to violate any provision of the Federal Constitution."

In *Tel. Co. v. Pendleton, 122 U. S., 247*, this Court decided:

"The Statutes of the State of Indiana, 4170, 4178, Rev. Stat. Ind., 1881, which require telegraph companies to deliver despatches by messenger to the persons to whom the same are addressed, or to their agents, provided, they reside within one mile of the telegraph station, or within the city or town in which such station is, are in conflict with the clause of the Constitution of the United States which vests in Congress the power to regulate commerce among the States, in so far as they attempt to regulate the delivery of such despatches at places situated in other States."

And the Court set forth the vice of the statute as follows:

"Indiana also requires telegrams to be delivered by messengers to the persons to whom they are addressed if they reside within one mile of the telegraph station, or within the city and town in which such station is; and the requirement applies, according to the decision of its Supreme Court in this

case, when the delivery is to be made in another State. Other States might conclude that the delivery by messenger to a person living in a town or city being many miles in extent was an unwise burden, and require the duty within less limits; but if the law of one State can prescribe the order and manner of delivery in another State, the receiver of the message would often find himself incurring a penalty because of conflicting laws, both of which he could not obey. Conflict and confusion would only follow the attempted exercise of such a power. We are clear that it does not exist in any State."

"The Supreme Court of Indiana placed its decision in support of the statute principally upon the ground that it was the exercise of the police power of the State. Undoubtedly, under the reserve powers of the State, which are designated under that somewhat ambiguous term of police powers, regulations may be prescribed by the State for the good order, peace and protection of the community. The subjects upon which the State may act are almost infinite, yet, in its regulations, with respect to all of them, there is this necessary limitation, that the State does not thereby encroach upon the free exercise of the power vested in Congress by the Constitution."

122 U. S., 359.

The case of *Telegraph Co. v. James*, *102 U. S.*, 650, quoted as authority to sustain this statute of the State of South Carolina, is peculiarly inapplicable, because the subject matter is widely different. The penalty in that case was for the non-delivery of the telegram when actually received within the State. The delict was a delict committed actually within the border of the State, which made it a delict, and not without the State. There was no necessity for investigation elsewhere; the wrong consisted in withholding negligently or wilfully that which was the property, the intelligence, belonging to the receiver of the message in the State, and not to deliver it was a matter of local wrong-doing. The wrong, if wrong at all, was committed within the knowledge of the telegraph company and its agents within the State, at the point of delivery, and no time was required and no time allowed in the statute for the investigation, for none was needed.

This is wholly a different subject matter, and a different question from the one at bar, in which the question whether or not the interstate or foreign carrier was liable, for a claim of the shipper, either as to short delivery or damage of goods, involves investigation and the information to be obtained at the port or point of shipment outside of the State, depending upon facts and circumstances and conditions not accessible at the point where the shipment is delivered, and where the claim is made; and necessarily forces the carrier into distant States and territories and foreign countries and remote regions for the information which alone enables him to fairly decide the question of his liability.

The subject matter of examination here involved being outside of the State, the methods of communication and the means of investigation outside the State, the customs and necessities of interstate and foreign trade and commerce, and particularly the reasonableness of time for interstate and foreign communication throughout the world, the relation of the United States to foreign nations in international intercourse, and the obligation of commercial treaties, the uniformity of the whole system, required by the Constitution and the decisions of this Court, all unite to force the conclusion that this State statute encroaches upon the exclusive power of Congress to regulate interstate and foreign commerce, and is therefore void.

J. P. K. BRYAN,
Of Counsel for Plaintiff in Error.

1909.

Clyde S.S. Co
Manchester Line v. Lin
and other
Foreign Carriers.

Supreme Court of the United States.

OCTOBER TERM, 1909.

No. 58

ATLANTIC COAST LINE RAILROAD COMPANY,
PLAINTIFF IN ERROR,
vs.
MAZURSKY.

No. 59

SOUTHERN EXPRESS COMPANY, PLAINTIFF IN ERROR,
vs.
McTEER.

No. 60

ATLANTIC COAST LINE RAILROAD COMPANY,
PLAINTIFF IN ERROR,
vs.
CHARLES.

No. 61

ATLANTIC COAST LINE RAILROAD COMPANY,
PLAINTIFF IN ERROR,
vs.
VON LEHE.

No. 62

ATLANTIC COAST LINE RAILROAD COMPANY,
PLAINTIFF IN ERROR,
vs.
VON LEHE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

Brief Filed as Amici Curiae, by J. Fraser Lyon, Attorney General of the State of South Carolina and W. H. Townsend of Counsel for State.

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No. 60

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PRELIMINARY STATEMENT.

In the five cases above stated there is but one question, which has been passed upon by the Supreme Court of South Carolina, as arising out of practically the same state of facts in each case.

This question is, whether the Supreme Court of the State of South Carolina erred in holding Section 2 of an Act entitled an "Act to regulate the manner in which common carriers doing business in this State (of South Carolina) shall adjust freight claims and claims for loss of or damage to freight" (24 South Carolina Statutes at Large, 81, quoted on printed page 14 of the Transcript of Record in the case of the Atlantic Coast Line Railroad Company against Charles, No. 60) is valid, and "does not violate the interstate commerce law so far as it applies to common carriers in this State in whose possession the goods are lost or damaged." (Transcript, Charles case, No. 60, printed page 14.)

No brief in these cases having been filed by the counsel for the original plaintiffs, this Court, recognizing, as said by Mr. Justice Gray, in Gulf, C. & S. F. R. Co. *v* Ellis, 165 U. S., 168, that "it is to be regretted that so important a precedent as this case may afford for interference by the national judiciary with the legislation of the several States * * * should be established upon argument *ex parte* in behalf of the railroad corporation, without any argument for the original plaintiff," has permitted the Attorney-General of South Carolina to file this argument as *amicus curiae*, presenting his views why the legislation in question should be sustained as a valid exercise of the State's power.

While the counsel for plaintiff in error in their brief (printed page 26) undertake to argue whether the statute in question "can by implication or presumptions be construed so as to mulct a common carrier for failure to adjust and pay within ninety days claims for loss or damage to interstate shipments, when the property itself had never come into its possession," such question was not raised in or passed upon by the State Supreme Court in any of the cases at bar.

In the Charles case (No. 60), which, as stated by counsel for plaintiff in error, was assumed by the State Supreme Court to settle all the others, and to have been made the basis for the judgment of the Supreme Court in all the cases, the State Court found as matter of fact, "the evidence showed that defendant was in possession of the goods lost" (Trans. printed page 14, original page 23), and held as matter of law: "that the statute in question, as it affects carriers doing business in this State who fail and refuse to adjust and pay the loss of or damage to goods *while in their possession*, is no unlawful interference with interstate commerce, even as applied to an interstate shipment." (Trans. printed page 15, original page 24.)

It is this conclusion of law by the State Court which the plaintiff in error, in his assignments of error (the same in each case), asks this Court to review. (Trans. printed page 21.)

In the Mazursky case (No. 58) the Court found as matter of fact, the goods were "lost while in possession of the defendant carrier" (Trans. printed page 7). This finding seems to have been based upon evidence that the goods lost were part of a single shipment, the balance of which was delivered by the defendant to the plaintiff. (Trans. printed page 2.)

In the McTeer case (No. 59) it is admitted in the argument of counsel for plaintiff in error (page 12), "the damage complained of occurred while the goods were actually in the defendant's possession." The State Court so found. (Trans. printed page 5.)

In the Von Lehe cases (Nos. 61 and 62) the appeal to the State Supreme Court raised no question as to where, or in whose possession, the loss occurred (Trans. No. 61, page 8; No. 62, page 8), hence that question was not passed upon by the Supreme Court, and the cases were argued as being on all-fours with the Charles case, No. 60.

That question, and the effect of the references in this statute to Sec. 1710 of the Code of Laws of South Carolina, 1902, which counsel for plaintiffs in error attempt to argue on pages 25 and 26 of the brief, was considered and passed upon by the State Supreme Court, in the case of Venning *v.* A. C. L. R. R. Co., 78 S. C., 55, 56 (the decision in which was filed on August 31, 1907, the same day as the decision in the Charles case, No. 60), in which it was expressly decided that the Act did not apply to claims for loss of property, which never came into the possession of the defendant.

The South Carolina Court there said (78 S. C., 55): "The section of main importance here is the second, which provides for the recovery for loss of or damage to freight; and penalties for failure to adjust and pay such loss or damage within a certain time. The question vital to this case is whether the statute can be construed to impose upon one connecting carrier liability for default of another, unless such carrier obtains and gives the information, or uses due diligence to obtain it, as provided in Section 1710 of the Civil Code. We do not think it can be so construed.

The main enactment as to the recovery of damages and penalties thus begins in Section 2: "That every claim for loss of or damage to property *while in the possession of such common carrier* shall be adjusted and paid within forty days," &c. The words we have italicized clearly limit the loss and damage which a carrier is required to adjust and pay for, to that which befalls while the goods are in the possession of such carrier, and excludes the idea of liability for loss or damage to the goods while in the possession of another carrier.

It is true there is a proviso at the end of this section "that no common carrier shall be liable under this Act for property which never came into its possession, if it complies with the provisions of Section 1710, Vol. I, of the Code of Laws of South Carolina, 1902." But as the body of the Act does not make the carrier liable for at all "for goods which never came into its possession," a *proviso* which exempts from liability for loss of or damage to such goods on certain conditions can have no effect. The Act imposes no liability to which the exemption can be applied.

The rule is that all parts of a statute, including *provisos*, are to be construed together, and effect given if possible to all. But it is contrary to reason as well as authority to *extend by implication* a *proviso* to cover that which is

opposed to the express language of the main enactment. Southgate *v.* Goldthwaite, 1 Bail., 367; U. S. *v.* Dickson, 15 Peters, 141; The Irresistible, 7 Wheat., 551; 26 Am. & Eng. Enc., 681; Endlich on Statutes, Secs. 184, 185. The fact that the statute is penal adds force to this conclusion. We are of the opinion that the *proviso* of section 2 has no effect, and the Act only imposes penalties upon the carrier for failing to adjust claims for loss, occurring while the goods are in its own possession.

It follows the plaintiff in this case cannot sustain his recovery on the ground that the defendant was liable under the Act of February, 1903, for goods lost by a connecting carrier because it failed to obtain and give information of the kind required in cases falling under that Act, or to use due diligence to obtain such information.

This Penalty Act of February will apply to the case, *if the finding on the new trial should be that the loss occurred on the defendant's road, but not otherwise.* It is attacked as unconstitutional under the interstate commerce clause of the Constitution of the United States. That question is discussed and decided against the defendant's contention in Charles *v.* A. C. L. R. R. Co., recently filed."

This was repeated in Moody *v.* So. Ry. Co., 79 S. C., 301. But this question was not passed upon in the Charles case. The State Court held the provision in question could have no application to carriers into whose possession the goods had come (Charles case, No. 60, Trans. printed page 15); hence it is not before the Court for consideration in these cases.

ARGUMENT.

A distinction exists between interstate commerce or an instrumentality thereof, on the one side, and the mere inci-

dents which may attend the carrying on of such commerce on the other

Hooper *v.* California, 155 U. S., 648, 655.
Williams *v.* Fears, 179 U. S. 278.

The act in question does not purport to regulate interstate or foreign shipments, or to affect the liability of a carrier upon contracts for such shipments.

It does not require the carrier to adjust or pay any claim for which it is not liable under the general law independently of this statute.

It purports to regulate, as stated in its title, "the manner in which common carriers doing business in this State shall adjust freight charges and claims for loss or damage to freight." These claims must be such as the carrier is liable for independently of any thing in this statute, and while they arise out of transactions involving interstate commerce, the adjustment of them, which the statute purports to regulate, is only incidentally connected with the transaction of interstate commerce.

Counsel for plaintiff in error, at page 19 of their brief, refer to the statement in McNeill *v.* So. Ry. Co., 202 U. S., 561; that a State, in the exercise of its police power, may make reasonable regulations concerning the place, manner and time of delivery of merchandise moving in the channels of interstate commerce, and then, at page 27 of their brief, argue: "It is idle to say that the imposition of a penalty in an amount disproportioned to the amount of the loss or damage sustained for failure to pay the claim within a limited time, will conduce to the better conduct of interstate commerce or in anywise aid or better it. *When the claim under the statute is capable of being filed, the commerce feature of the transaction*, in so far at least as the duty to transport and deliver is concerned, *has ended*. The obligation

then remaining upon the carrier, if any, is only to satisfy any loss or damage which may have occurred due to its negligence or to the breach of its contract of carriage. The threat of the penalty is, in truth, but an admonition to pay without suit or stand to pay the penalty."

In passing upon a similar statute, in almost the same words as the statute now under consideration, the North Carolina Court, in Morris *v.* So. Express Co., 146 N. C., 167; 59 S. E., 667; 15 L. R. A. (N. S.), 987, said:

"The penalty is imposed, not directly upon interstate commerce itself, or during the transportation of the goods, but it arose by reason of default on the carrier's part after the transportation had terminated, and is in enforcement of the duty incumbent upon it by law to adjust and pay for damages arising by reason of its negligent default. The penalty is in no sense a burden on intercourse and traffic between the States, but it is in aid of such traffic, and in the absence of Congressional legislation to the contrary, is a proper subject of State legislation. We were referred by counsel to cases of Central R. Co. *v. Murphy*, 196 U. S., 195; Houston & T. C. R. Co., *v.* Mayes, 201 U. S., 321, and McNeill *v.* So. R. Co., 202 U. S., 543; but we do not think that these decisions are in conflict with the views we have held to be controlling in the case before us. As we understand them, they all proceed upon the idea, not that regulations in question are void because they affect in some way interstate commerce, but because they interfered directly with intercourse and traffic between the States, and were of a character that imposed an undoubted and distinct burden upon them."

The statute is not unlike one prescribing the time within which actions on contracts involving transactions of interstate commerce may be brought in the State courts. Gulf &

C. R. Co. *v.* Eddins, 7 Tex. Cir. App., 127. It is remedial, as well as penal.

Farmers &c Bank *v.* Dearing, 91 U. S., 29.
Johnson *v.* So. P. R. Co., 196 U. S., 17.

It provides a remedy for a claimant wronged by the delict of a common carrier in failing to adjust within a reasonable time, prescribed by statute (Moody *v.* So. Ry. Co., 79 S. C., 299), a just claim founded on the common law, or some valid statute, for loss or injury to goods in the carrier's possession, after the claim shall have been filed at the point of destination of the goods in this State.

The State Court has not held as contended by Mr. Bryan, in his brief, page 6: the "time limit, that may be wholly inadequate and oppressive, and denying an opportunity of investigation and tracing lost or damaged freight cannot be varied by testimony." What they held in the case of Moody *v.* Railway, cited by him, was that the Court "was right in excluding the *opinion of a witness as to the sufficiency of the forty days allowed by the statute*, and as to whether in case certain difficulties—not however, appearing here—arose, the information could be given within the prescribed time. *The question of due diligence was for the jury.*"

The delict, i. e., the failure to adjust and pay the claim, occurs, and the cause of action for the penalty given by this statute arises at the point of destination of the goods, where the claim is filed within the State.

Riley *v.* So. Ry. Co., 81 S. C., 390.

In Colleton Mercantile &c. Co., *v.* Atlantic Coast Line Railroad Company, 82 S. C., 121, the Court speaking of the Act here in question held: "The statute was designed to effectuate an important public purpose with respect to the duty of common carriers in this State, and the delict penalized occurred in this State."

Counsel for plaintiff in error argue at page 29 of their brief: "A common carrier may be penalized for its failure to adjust a claim for damages growing out of an injury to an interstate shipment if such injury occurs on its line, even though in another State than South Carolina."—Citing Seegers v. S. A. L. R. Co., 73 S. C., 71.

This has not been decided by the South Carolina Court. Certainly not in the case cited by counsel. The delict penalized is as stated by him, "the failure to adjust a claim for damages," made at the point of destination of the goods in this State, and not the "injury to an interstate shipment" occurring either within or without the State.

The two delicts are clearly distinguishable. Admitting that "the duty to make prompt settlement for loss or damage to goods is * * * an incident of (to) the duty to transport and safely deliver," (Seegers v. Ry., 73 S. C., 71), it does not follow that the State may not—at least in the absence of Congressional action—compel a carrier to discharge this incidental duty, the violation of which occurs in the State.

> Mo. P. R. Co., v. Larabee Flour Mills, 211 U. S., 624.

On page 14 of their brief, counsel for plaintiff in error properly say: "This declaration (in Seegers' case, and the Best case, quoted on page 13 of their brief) by the highest Court of the State of South Carolina as to the primary object and purpose of the statute here under consideration, adopted and affirmed as it has been by this Court, must be accepted by the parties litigant now here as the final word on that subject, and the discussion of the present cases must proceed with due regard thereto."

That object and purpose was there declared to be, "not primarity to enforce the collection of debts, but to compel the performance of duties which the carrier assumes where it enters upon the discharge of its public duties."

"Can it be said that the imposition of a penalty for the violation of a duty which the company owed by the general law of the land is a regulation of, or an obstruction to, interstate commerce within the meaning of that clause of the Federal Constitution under discussion? We think not."

W. U. Tel. Co. *v.* James, 162 U. S., 660.

"The rules prescribed for the construction of railroads, and for their management and operation, designed to protect persons and property otherwise endangered by their use, are strictly within the scope of the local law. They are not in themselves regulations of interstate commerce, although they control in some degree, the conduct and liability of those engaged in such commerce. So long as Congress has not legislated upon the particular subject, they are rather to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the State to regulate the relative rights and duties of all persons and corporations within its limits."

Chicago, M. & St. P. R. Co. *v.* Solan, 169 U. S., 137.
Pennsylvania R. Co. *v.* Hughes, 191 U. S., 491.

So, the Arkansas Court, speaking of a State statute imposing a penalty upon a carrier for failure to deliver freight to the holder of a bill of lading issued for an interstate shipment, in Ark. So. Ry. Co. *v.* German National Bank, 77 Ark., 489; 92 S. W., 524, said: "It is the duty of the carrier to deliver property specified in the bill of lading to the legal holder thereof. The object of the statute, and the effect if obeyed, is to enforce this duty and protect

the rights of the holder. In the absence of Congressional legislation on the subject the State can do so."

Respectfully submitted,

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